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REPORTS OF CASES

RELATING TO THE

Duty and Office of Magistrates,

DETERMINED IN THE

COURT OF KING'S BENCH,

FROM

HILARY TERM, 1822, TO EASTER TERM, 1823.

BY

JAMES DOWLING, Esq. OF THE MIDDLE TEMPLE,

AND

ARCHER RYLAND, Esq. OF GRAY'S INN,

BARRISTERS AT LAW.

VOL. I.

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1835.



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REPORTS
 OF
CASES,
 IN THE
COURT OF KING'S BENCH,
 FOR THE USE OF
Justices of the Peace.

HILARY TERM, 1822.

WALTER v. SMITH.

1822.

Wednesday,
January 23.

TROVER for the conversion of a watch, watch chain, and seals. Plea, Not Guilty, and issue joined. At the trial before *Abbott*, C. J. at the London adjourned Sit-tings after last Term, the case proved in evidence was this:—The plaintiff had pawned his watch, valued at ten guineas, with the defendant, who is a regularly licensed pawnbroker, for the sum of two guineas, and received the usual duplicate required to be given by the General Pawnbroker's Act, 39 & 40 *Geo. 3. c. 99.* After the year and a day allowed by the 17th section of that statute to the pawner to redeem the pledge, had expired, the plaintiff applied to the defendant to have his watch, watch watch, &c. and, after the year had expired, tendered to the pawnbroker the money lent, and interest, and the pawnbroker refused to deliver, he might maintain trover, not having forfeited his title to the goods by reason of that section of the statute.

The General
 Pawnbroker's
 Act, 39 & 40
Geo. 3. c. 99.
 s. 17, declares
 that goods, &c.
 which are
 pledged and
 are not re-
 deemed within
 a year after
 the day of
 pledging, shall
 be forfeited,
 and may be
 sold by the
 pawnbroker:
 Held, that
 where the
 plaintiff had
 pawned a

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chain, and seals returned to him, and tendered the money lent thereon, together with the interest which had accrued on the money lent; but the defendant refused to deliver the pledge, on the ground that it was forfeited by the expiration of the year after the day of pledging, not having been redeemed within that time. • It was proved as a fact, that the defendant had not sold or otherwise disposed of the pledge at the time of the demand and refusal. The question at the trial was, whether this action would lie, by reason of the construction of the 17th section of the Pawnbroker's Act. The Chief Justice was of opinion, that the plaintiff had not so far forfeited his interest in the goods as to deprive him of any remedy against the pawnbroker, and the defendant having refused to deliver them up after the tender of the money lent, and interest due thereon, he was guilty of a conversion, and, therefore, *troyer* would lie. The jury found their verdict for the plaintiff.

*Gurney* now moved for a rule to shew cause, why the verdict for the plaintiff should not be set aside, and a non-suit entered. He contended, that according to the true construction of 39 & 40 Geo. 3. c. 99. s. 17, the plaintiff could not maintain this action. By that section it is declared, "that all goods and chattels which shall be pawned or pledged shall be deemed forfeited, and may be sold at the expiration of one whole year, exclusive of the day on which the goods and chattels are so pawned, as *aforsaid*." The remainder of this section merely declared, that the sale of the forfeited pledge should take place under certain regulations. Now, by the provisions of this section, it seemed perfectly clear, that the power of redemption was gone as soon as the year and the day expired. It was true, that by the 19th section, "in case any person entitled to redeem goods in pledge shall, be-

fore, or upon the expiration of the said one year from the time of pawning the same, give notice in writing or in the presence of one witness, to the pawnbroker, or leave the same at his usual place of abode, not to sell the same, at the end of the said first year, then, and in every such case, such goods shall not be sold or disposed of by the pawnbroker until after the expiration of three calendar months, to be computed from the expiration of the said year, during which said term of three calendar months, the owner of the said goods shall have liberty to redeem the same upon the terms stipulated in the act." In this case, however, no such notice had been given, but the year and the day were suffered to expire, and, therefore, the plaintiff had forfeited all title to the goods. No meaning could be given to the words "*shall be deemed forfeited*," other than that now contended for, unless they could be in any way controuled by the 19th section; but as the plaintiff had not brought himself within the protection there given, the 17th section must be considered as working a forfeiture; for the moment the year and the day expired, all right or interest in the owner of the goods was gone, and the pawnbroker had a right to dispose of them in the manner provided by the act, there being no other mode provided, of indemnifying him for any expenses he might have incurred. It had always been understood in the trade and business of a pawnbroker, that this was the meaning of the statute. There was no meaning in language, unless the words of the 17th section were to have this construction, and therefore the defendant was entitled to enter a nonsuit.

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ABBOTT, C. J.—I am of opinion, that we cannot give to the word "*forfeited*" the effect contended for in argument, and for this reason,—*forfeiture*, imports that the party forfeiting has lost the entire absolute right to the

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SMITH.

property; whereas it is manifest, that after the period which the law has fixed by this statute, namely, a year and a day, though the goods are declared to be forfeited, and may be sold, yet the whole property in the goods is not gone from the original owner. If that were so, the sale would be entirely for the benefit of the pawnbroker, but that evidently was not the intention of the legislature. The object of the legislature in giving the pawnbroker a power of sale, is to enable him to reimburse himself for the money lent, and for the interest which has accrued; but at the same time the statute gives the original owner an opportunity of redeeming his property before the sale takes place. Looking to the provisions of the act of parliament, it is impossible to put that sense upon the word "forfeited," which is contended for. It is quite unnecessary to do so. The act may stand well enough, and answer all the purposes of justice without it. If at the end of the year and the day, the pledge be not redeemed, the pawnbroker may take measures for putting up the property for sale; but if at any time before the sale has taken place, the owner tenders the principal and interest of the money lent, and all the expences incurred, the pawnbroker may, with very great justice, restore the goods. He sustains no injury, and is just in the same situation in which he would be if the goods were actually sold; because, by the 20th section, the overplus, if any, after deducting the principal, interest, and expences, must be paid on demand to the owner, at any time within three years after such sale; whereas a contrary construction would impose the most serious injury on the owner of the goods. It appears to me, therefore, that the most just and reasonable construction we can put upon this statute is to say, that the right to the goods is not absolutely forfeited by the 17th section, notwithstanding the want of notice under the 19th section.

BAYLEY, J.—I am of the same opinion. I do not think that the construction we are now putting upon this statute can make any difference to the pawnbroker, because the power of sale is only given for the purpose of reimbursing him, and paying whatever interest is due at the time of sale. The pawnbroker, by the sale, gets his principal and interest, and if the party pledging, before any sale takes place, reimburses the pawnbroker for every expence he has incurred in the progress towards making the sale, it seems to me, that he has complied with every thing which, according to the act of parliament, ought to be done. The words of the 17th section are, “shall be deemed forfeited, and *may be sold*.” I do not think that means so forfeited as to become the absolute property of the pawnbroker, but only so far as that the pawnbroker may take steps towards proceeding to sell, and if the original proprietor tenders every thing which the pawnbroker can demand or receive before the sale takes place, he has the power of redemption.

HOLROYD, J.—I am of the same opinion. I think, that by the 17th section, the pawn is not to be considered forfeited to all intents and purposes, if not redeemed within the year and day; but only to enable the pawnbroker to sell the pledge for the purpose of raising the principal money, interest, and warehouse room, due thereon. The profit which the pawnbroker is entitled to take, is so much, according to the amount of the sum lent upon the pledge, from, and during the time the property remains in pawn. Therefore, I apprehend, that so long as the pledge remains undisposed of, the original owner has the power of redeeming it, because the right to sell is only for the purpose of enabling the pawnbroker to obtain his profit upon the pawn. The object of the sale is not for the benefit of the pawnbroker merely, be-

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cause he can only take to himself the principal, interest, and other incidental expences, returning to the owner the surplus after sale. The plaintiff in this case tendered the money lent, and the interest, and, I think, he had a right to redeem his property upon paying the principal, profit, and expences incurred. If the pawn were absolutely forfeited by the 17th section, the other provisions of the statute would be absolutely useless, and such advantages would be given to the pawnbroker as could never have been contemplated by the legislature. I am clearly of opinion, that if the pawner tenders the principal, interest, and expences, at any time before sale, he is entitled to redeem his property, and that it is not forfeited by force of the 17th section, if not redeemed within the time there stipulated.

BEST, J.—This statute having been passed for the purpose principally of protecting the labouring classes of the community against the improper practices of pawnbrokers, it is fit we should put such a construction upon it as shall do no injustice to the pawnbroker, but at the same time, shall give a protection to those whose misfortunes compel them to resort to this mode of relieving their distresses. The difficulty in this case has arisen upon the construction of the word “forfeited,” which, generally speaking, has a different meaning from that obviously given to it by this statute. The word “forfeited,” in its ordinary sense, means putting an end to all right of property in the person to whom it originally belonged, and to transfer it to somebody else. The legislature could not have meant to convey that sense by the word here used. It would have been most unjust so to declare; but if that had been their intention, it would have been unnecessary to say, that after the expiration of twelve months the pawnbroker might sell, for, if the goods were completely forfeited to all intents and purposes, the right of sale and

disposal would vest as a matter of course in the pawnbroker; but that certainly was not the intention of the legislature, for they have only said, that the goods shall be deemed forfeited, and "*may be sold*" at the expiration of one whole year. These latter words would be unnecessary if the word "forfeited" were to have the ordinary construction which belongs to it. The words "may be sold," clearly mean "may be sold for the benefit of the pawner," who is to receive the surplus after the pawnbroker has satisfied his demand for money lent, and the high rate of interest due upon the property whilst it remained in pledge. It would be absurd to say, that the property becomes absolutely forfeited, if not redeemed within the time specified by the 17th section. It can be no benefit to the pawnbroker to sell so long as he gets all his money back, and his legitimate profits; but to the pawner it may be a matter of great importance to have his property restored, by putting the pawnbroker in as good a situation as he possibly could be, with reference to this act of parliament. It is said that the pawnbroker is put to certain expences, and that there is no other mode of indemnifying him except by the sale of the goods pledged. Whatever expences he has fairly and legitimately incurred, he is entitled to receive. It would be unnecessary that this act should provide for that, because every broker, of whatsoever denomination, has his lien for any expences he has incurred, with reference to the goods of another in his possession. But in cases of this description it would be very difficult to apportion the expence on each minute article contained in a pawnbroker's catalogue of sale. There is no coin in the realm which would be sufficiently small for a tender in many instances, to cover the expence incurred by the pawnbroker. That question, however, does not arise in this case. I am of opinion that this verdict ought to stand.

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Rule refused.



1822.

Friday,  
January 25.

## The KING v. PATRICK DUNN.

Where an information for perjury, committed before a Select Committee of the House of Commons, appointed to try and determine the merits of an election, averred, that the Committee was appointed for that purpose, and that the committee were sworn to "try the matter of the petition," &c. : Held, that the situation of the committee was well described to support the averment, though described in 10 Geo. 3. c. 16. s. 13, as a Select Committee "to try and determine the merits of the return or election."

**T**HIS was an information filed by his Majesty's Attorney-General, at the instance of the House of Commons, against the defendant, for wilful and corrupt perjury, assigned upon evidence given by him on oath before a committee of that House, ballotted to try the merits of two petitions, against the return of members to serve in parliament for the borough of *St. Ives*, in the county of *Cornwall*. The defendant pleaded Not Guilty; and at the Sittings in *Westminster* after last *Michaelmas* Term, before *Abbott*, C. J., the defendant was found guilty.

*Harrison* now moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted. He made two points, 1. That the oath required to be administered to the members of the election committee in question, in pursuance of 10 Geo. 3. c. 16. s. 13, had not been properly stated in any of the counts of the information; and, 2. That the committee had been improperly described in all the counts, with reference to their situation under that act of parliament. There had been two petitions presented to the House of Commons against the return of *I. R. G.*, Esq. to serve in parliament for the borough of *St. Ives*. The first petition complained of nothing connected with the election itself, but only of the return; and prayed that the election and return might be declared null and void. The second petition complained, that the member returned had been guilty of treating; that persons who had received parochial relief within twelve months previous to the election had been illegally and improperly permitted to vote; and it farther alleged an illegal interference at the election of persons

connected with the revenue ; and in conclusion prayed, that the House would take the premises into consideration, and declare that the said *I. R. G.*, Esq. was not duly elected, and ought not to have been returned to serve in parliament for the said borough. The information stated, that the committee chosen, nominated, and selected to be a Select Committee, to try and determine the merits of the said election, had duly assembled, and had taken the following oath, namely, “ You and each of you shall, well and truly, try the matter of the petitions referred to you, and a true judgment give according to the evidence.” The first objection therefore was, that the oath administered to the committee had not been properly stated with reference to the purpose for which they were assembled. The oath required them to try the matter of the petitions ; and in the information they were averred to be “ chosen, nominated, and selected to try and determine the merits of the said election.” Now the merits of the election and the petition might be totally different things. The merits of the election might be a proposition more comprehensive, and embracing a greater number of circumstances than the mere petition itself, which might have relation only to form and not substance. Therefore there was a misdescription of the oath which ought to have been administered to the committee. Then, as to the situation of the committee when sworn, they appeared not to be properly described according to the act of parliament. In 10 *Geo. 3. c. 16. s. 13*, they are to be “ a Select Committee to try and determine the merits of the return or election.” Now there is a main distinction between the *return* and the *election* ; for the *return* may be good in point of form, and the *election* bad on the merits. Petitions have been frequently preferred merely against the return, without reference to the election ; and therefore if there be a distinction between the return and the

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election, the objection to this information arises, and the situation of the committee has not been properly described. He referred to the *Morpeth case*, in 1775 (*a*); the *Middlesex case* (*b*), and the *Westminster case*, in 1805 (*c*); as cases shewing that the return is frequently considered unconnected with the election.

ABBOTT, C. J.—I am of opinion that there is no ground for disturbing the verdict in this case. The statute says, that the committee “shall be a Select Committee to try and determine the merits of the return or election, appointed by the House to be taken into consideration.” Having been sworn for that purpose, they become a committee to try the return of the election, if the merits of the return be distinct from the merits of the election. If they are different things, then the committee are sworn either to try the merits of the election, if that be the object, or sworn to try the merits of the return, if that is referred to their consideration. But when they are sworn to try the merits of the election or return, then the merits of the return being wholly dependent upon the merits of the election, they are properly sworn; and therefore it appears to me, that they are described correctly, when it is stated that they are sworn to try and determine the merits of the election. I also think that the description of the oath is equally good. What is the effect of it? They are sworn according to the terms of it, “well and truly to try the matter of the petition.” That is, in effect, to try and determine the merits of the election. They become a committee for that purpose, and so the statute declares they shall be. The matter of the petition is the merits of the election; for the return in this case can be only bad provided the election is bad. There may be

(*a*) 2 Peck. Elec. Cases, 381.  
(*b*) S. B. Rep. 387.

(*c*) 1 Peck. Elec. Cases, 420.

cases where the complaint is wholly against the return, but here the return is purely consequential. I think therefore that in this case the rule ought to be refused.

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The King  
v.  
Dunn.

The rest of the Court concurred.

*Per Curiam.*

Rule refused.

—  
WOOD v. VEAL, Gent.


Monday,  
January 28.

**T**RESPASS for breaking and entering the plaintiff's close.—Plea, 1st. Not Guilty; 2d. that the said close was a common and public highway. The cause was tried before *Abbott, C. J.* at the adjourned *Middlesex* Sittings after last *Michaelmas* Term, when it appeared in evidence, that in the year 1796 the plaintiff purchased the estate of which the *locus in quo* formed a part, subject to a lease for ninety-nine years, which expired in 1818. The estate comprised several houses to which the *locus in quo* was the only access, being a place called *Little Abingdon Street*, in the City of *Westminster*, and terminating in a *cul de sac*. The back of the defendant's premises abutted on *Little Abingdon Street*, but his house was not situate within it. Shortly after the expiration of the lease, the plaintiff erected a fence across the entrance of the street, and restricted the use of it to the tenants of the houses therein situated, and their visitants. This fence the defendant removed, which was the trespass complained of. On the part of the defendant evidence was produced to shew, that *Little Abingdon Street* had for a great number

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Where a way has been used by the public for a great number of years over a close, leading only to the houses of lessees, there being no thoroughfare, the privity of the landlord and a dedication by him to the public, is essential to constitute it a public highway. And evidence that the *locus in quo* has been paved and lighted for the like number of years, under the authority of a public, local, and personal act of parliament, in which it is enumerated by name amongst the

public streets, lanes, &c. within the scope of the statute, but does not prejudice the reversionary rights of the owner of the fee.

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of years been lighted and paved under the authority of a public, local, and personal act of parliament, passed for lighting and paving the public streets, lanes, alleys, &c. therein mentioned, amongst which *Little Abingdon Street* was enumerated by name. A great number of witnesses proved, that for more than sixty years there had been no obstruction whatever in the use of the street by the public. The learned Judge charged the jury that the mere user of the street in question by the public, unless it had been originally dedicated to it by the ground landlord, would not make out the defendant's plea. The dedication of it to the public by the lessees of the ground landlord, was not sufficient to constitute it a public highway; and, after their tenancy had expired, persons going upon the *locus in quo* would be trespassers, without the leave and licence of the landlord. The jury, under this direction, found a verdict for the plaintiff, with nominal damages.

*Gurney* now moved for a new trial on two grounds, first, a misdirection of the learned Judge in point of law; and, second, that the verdict was against the weight of evidence. As to the first ground he contended, that the learned Judge ought to have told the jury, that as this street was mentioned in the act of parliament for paving and lighting the streets, &c. of *St. Margaret's, Westminster*, passed so long since as sixty years, as a public street, and had been paved and lighted under the authority of the same, it must be considered as a public highway, without regard to any evidence of dedication on the part of the owner of the soil. And as to the second point, he insisted, that as the evidence on the part of the defendant went to shew that *Little Abingdon Street* had for more than sixty years been actually used by the public as a public highway without interruption, the verdict of the

jury was not warranted. He referred to *Rex v. Lloyd* (a), *Rex v. Barr* (b), and *The Rugby Charity v. Merryweather* (c).

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ABBOTT, C. J.—I am of opinion there ought to be no new trial in this case. If the defendant has a right of approach to his own house over the *locus in quo*, he may bring an action for disturbing it. I should have felt some concern if, in the result of the trial of a question of this kind, it had been found that places of this description are to be considered public highways. This is a little court, leading to four or five private houses; but it is not a thoroughfare. I told the jury, however, that for the purpose of the present case they might consider that in point of law there might be a highway in a place where there was no thoroughfare. That was with reference to the case of *The Rugby Charity v. Merryweather*. I then left it to them to consider whether they were satisfied there had been a dedication of this place to the public by the owner of the fee, or by his authority, prior to the lease of 1719, telling them at the same time that nothing done by the tenants during the continuance of the lease, without the authority of the landlord, could prejudice his reversionary rights. I told them, that certainly during the continuance of the lease the landlord could not have erected such a bar as this without committing trespass; but at the same time that the landlord might file a bill of injunction to restrain his tenants from making the *locus in quo* a public highway during the continuance of their tenancy. The point I left them to consider was, whether there had been a dedication to the public of this spot by the owner of the soil; and I told them, that if they were satisfied there had been such a dedication, they would find for the defendant;

(a) 1 Campb. 260. (b) 4 Campb. 16. (c) 11 East, n. a. 376.

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but if otherwise, for the plaintiff; and they found their verdict for the plaintiff.

BAYLEY, J.—The question whether there can be a public right of way over land where there is no thoroughfare, is a question which the Court will consider when it shall plainly and distinctly arise, but it does not arise in this case. The ground of defence here is, that there has been such a public user of the soil as to shew that the public have a right to go over it, and to continue the use of it in future. Now, *primâ facie*, public use is evidence of public right; but that may be explained; and if it is satisfactorily explained, then that destroys the notion of the existence of that apparent right which can be legally referred to something else. To give the public a right, it must be given by the person who is the owner of the fee. If given by a person who has a limited interest, it only continues during the continuance of that interest. In this case the owner of the soil does not grant a public right of way, but he gives to his tenants, who occupy particular houses, a right of way to be exercised by them for a period of ninety-nine years; and he divests himself of all power of obstructing them in the free access to those houses during the continuance of that term. The mere dedication of this as a right of way to the public by the tenants, would not bind the owner of the fee; and it was for the jury to say, whether the spot had ever been dedicated by the owner of the soil to the public; and therefore I think the case was properly left to the jury.


HOLROYD, J.—I am of opinion also that the case was rightly left to the jury; and I can find no fault with the conclusion to which they have come. When the question whether there can be a public right of way, where there is no thoroughfare, shall fairly arise, the conse-

quences of the doctrine laid down in the case of *The Rugby Charity v. Merryweather* may be further considered. That case decided, for the first time, that where there is no thoroughfare, there may be a public highway. Should that case ever be considered again, I think it will be found at variance with principles which have been solemnly decided ; but taking it for granted that the doctrine there laid down by Lord *Kenyon* is correct in point of law, I think the jury have, in this case, drawn the right conclusion.

BEST, J.—I entertain the greatest respect for the authority of Lord *Kenyon*; but I think the principle upon which the case of *The Rugby Charity v. Merryweather* (a)

(a) “ It was an action of trespass brought by the trustees of *The Rugby Charity v. Merryweather*, at the Sittings in *Middlesex*, on the 26th of *May*, 1790, to try a right of way in dispute between the plaintiffs and the Governors of *The Foundling Hospital*. There were several pleas of justification on the record, amongst others, one stating that the *locus in quo* (which was *Lamb’s Conduit Street*) was a common highway, and that the supposed trespass was committed in removing an obstruction there. The evidence was, that the right of the soil was clearly in the plaintiffs; but there had been a common street there, though no thoroughfare, by reason of the houses at the end, for above fifty years. The plaintiffs accounted for not having put up a bar or the like, to denote that the way was not relinquished to the public at large, by shewing that the *locus in quo* had been in lease for a long term up to the year 1780. Lord *Kenyon*, C. J. asked what the plaintiffs had to say to the time from 1780 till about two years ago, when they had put up a bar. In answer, it was said, that they had been in treaty with *The Foundling Hospital*, respecting the allowing them a right of way, which was finally broken off. Per Lord *Kenyon*. If this rested solely on the ground of a question of right between the plaintiffs and *The Foundling Hospital*, the former would certainly not have been barred by the time which elapsed from 1780 till the obstruction was put up, pending the treaty between them: but during all that time they permitted the public at large to have the free use of this way, without any impediment whatever; and therefore it is now too late to assert the right; for this is quite a sufficient time for presuming a dereliction of the way to the public. In a great case, which was much contested, six years was held sufficient. And as to this not being a thoroughfare, that can make no

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was decided, is a departure from that principle upon which public rights are founded. The right of way in this case is connected only with the particular houses to which the passage in question leads, and is limited by the duration of the tenancy of the respective occupiers, who certainly had no right to dedicate it to the use of the public in prejudice of the reversionary rights of their landlord, whose concurrence in the dedication was essential to the confirmation of this as a public highway. I am of opinion therefore that the verdict is right.

Rule refused.

difference. If it were otherwise in such a great town as this, it would be a trap to make people trespassers. The Duke of Bedford preserves his right in *Southampton Street, Covent Garden*, by a bar set across the street, which is shut at pleasure, and shews the limited right of the public. The jury found a verdict for the defendant upon the issue on the common highway."

Tuesday,  
January 29.

The KING v. GEORGE CLARK alias JOHN JONES.

Where a defendant was indicted with an *alias dictus*, and pleaded in abatement that he was not known by such name: Held, that the plea must be demurred to, and could not be quashed on motion.

THE defendant had been indicted by the name of *George Clarke* for an alleged libel. To that indictment he pleaded a misnomer, and gave his name as *John Jones*, upon which the prosecutor abandoned that indictment, and indicted him again by the name of *John Jones* alias *George Clark*. The defendant having pleaded to this indictment that he was never called or known by the name of *George Clark*, but that he had always been called and known by the name of *John Jones*.

*G. Marriott* now moved for a rule to shew cause why this plea should not be quashed, and the defendant

required to plead in chief, for that this was no plea at all, or if it was a plea, it amounted to the general issue. He cited Com. Dig. tit. *Pleader*, E. 14. Hob. 127. and 1 Leon. 178, as cases shewing that the prosecutor was not bound to demur, but might move to quash the plea.

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Per Curiam.—We cannot try the merits of this plea on affidavit. The proper course is to demur, or to reply and take issue on the plea. The defendant has a right to be indicted by his right name if he thinks proper. If he is not indicted by his right name, he has a right to plead in abatement. All the defendant says by his plea is, that the name by which he is indicted is not his true name. It may not be a good plea, but the prosecutor must demur to it. It is said, that when a plea amounts to the general issue it shall not be demurred to, but this is not a plea to the general issue. The general issue on an indictment is Not Guilty, and no assumption or inference can convert this into a plea of Not Guilty. If it is no plea at all, let the prosecutor demur.

Rule refused.

The KING v. The JUSTICES of NORFOLK.

Thursday,
 January 31.

THIS was a rule, calling on the Justices of *Norfolk* to shew cause why a writ of *Mandamus* should not issue, commanding them to receive, enter, and hear an appeal at the next General Quarter Sessions of the Peace for the county of *Norfolk*, against an order of two Justices, re-

Justices may supersede their own order when improvidently made.

On the 20th August two Justices removed a panper from the

parish of *A.* to the parish of *B.* On the 5th of *September* the churchwardens of *B.* gave notice of appeal to the Sessions, to be holden on the 17th of *October*; on the 10th of *October* the Justices made an order, superseding their former order of removal, upon doubts of its validity, which *supersedeas* was served on the parish officers of *B.* who treated it as a nullity, and went to the Sessions, where the Justices refused to hear the appeal; and now this Court refused to grant a *mandamus* to the Sessions, to enter, hear, and determine it.

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moving *Hannah*, the wife of *Edmund George*, and their three children, from the parish of *Little-Hautboys-with-Lammas* to *Repps with-Bastwick*, both in the county of *Norfolk*.

On the 20th of *August*, two Justices removed the paupers from *Repps-with-Bastwick* to *Little Hautboys*, as the place of the husband's settlement. The removal took place upon the examination of the pauper's husband, *Edmund George*, who, at the time of his examination, was under confinement in the House of Correction at *Aleysham*, in the said county, having been convicted of larceny at the *Epiphany Sessions*, 1821, and sentenced to two years imprisonment. On the 5th of *September*, the churchwardens of the parish of *Little Hautboys* gave notice of appeal to the churchwardens of the removing parish, against the order of removal for the then ensuing Sessions, to be holden at *Norfolk*, on the 17th of *October*, but on the 10th of *October*, an order was served by the respondents upon the appellants, by which the removing Justices superseded their former order of removal; which *supersedeas* stated, that doubts had been entertained, whether the order of removal could be supported by the evidence, the pauper's husband being then confined in the House of Correction upon a conviction of felony, and thereby required the appellant to deliver up the duplicate of the said order to be cancelled, and further required the respondents to take back the paupers who had been so removed. Soon after the *supersedeas* had been served, the appellants consulted their attorney, and notwithstanding the *supersedeas*, it was determined to go to the Sessions, and prosecute the appeal in pursuance of the notice which had been served on the 5th of *September*, and accordingly a motion having been made by counsel at the Sessions, to enter and respite the appeal, it was resisted

by the respondents; and the Justices, upon hearing the circumstances of the case, refused to receive the appeal, and in *Michaelmas* Term last, the appellants obtained a rule nisi for a *mandamus*, to receive, hear, and determine the appeal.

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Anderson now shewed cause against the rule, and contended, that it was perfectly competent for the removing Justices to supersede their original order, if, upon consideration, they found it could not be sustained, and therefore that a *supersedeas* was binding upon the appellant parish, which need not have appealed against the order of removal which, in fact, by force of the *supersedeas*, became a nullity, and therefore the Justices did right in refusing to enter the appeal, for in effect there was nothing against which the appeal could be heard. He produced an affidavit, shewing that the appellants had had notice before the *supersedeas* was granted, that the respondents intended to abandon the order of removal, and had offered to pay all the costs of maintenance, &c. He referred to *Rex v. Diddlebury* (a), where Lord *Ellenborough*, C. J. said, "There are two ways of getting rid of an order, one by consent of the parish in whose favour it is made to abandon it, the other by waiting till the time of appeal, and appealing against it to the Sessions, by whom it may be quashed, if not supported. Here the parish in whose favour it was made, finding upon further information that they could not support it, very sensibly determined to abandon it at once by consent, and acted accordingly. And what objection can there be to a party's abandoning a judgment intended for his own benefit?" This seemed a direct authority for discharging this rule with costs.

(a) 12 East, 861.

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H. Cooper, in support of the rule, distinguished this case from *Rex v. Diddlebury*, because there, there was a consent to get rid of the order of removal, and that consent was binding on the parties, but here there was no such circumstance, and in order to give validity to the abandonment it was necessary to have the consent of the appellants. This was a question involving a general principle, and ought not to be considered with reference to circumstances of convenience or inconvenience in particular cases. It was important to attend to dates in this case. The order of removal takes place on the 10th of *August*, notice of appeal is given on the 5th of *September*, and the order of *supersedeas* is not served until the 10th of *October*, so that a period of twenty-five days are suffered to elapse after notice of appeal, before any steps are taken to supersede the order, and the *supersedeas* is served only six days before the Sessions commence, making altogether a period of fifty-one days after the original order is served. Now, the question is, whether, under the statute 13 & 14 *Car. 2.* and 3 & 4 *W. & M. c. 11*, the Justices having made an order of removal, have the power to supersede such an order upon an application moving from the respondent parish after notice of appeal has been given against the order; and whether the Justices in Sessions are not bound to receive the appeal and proceed to the hearing thereof, notwithstanding the order of *supersedeas*. Upon principle, and upon the authority of decided cases, these questions must be decided in the negative. By the statute 13 & 14 *Car. 2.* it is declared, "that all persons aggrieved by any such judgment of the said two Justices, may appeal to the Justices at Quarter Sessions, who are hereby required to do them justice according to the merits of the case." And by the statute 3 & 4 *W. & M.* "If any person or persons shall feel themselves aggrieved

by any determination which any Justice shall make in any of the cases aforesaid, the said person or persons shall have liberty to appeal to the next General Quarter Sessions, who, upon full hearing of the said appeal, shall have full power to determine the same." These are the provisions of the statutes. Now, upon principle, nothing can be more reasonable than the present application. It seems clear, that after notice of appeal, the jurisdiction of the removing Magistrates is gone. The case then comes before another jurisdiction, namely, that of the Justices in Quarter Sessions. If after notice of appeal, the removing Justices might issue their *supersedeas*, they might issue it at any subsequent time, and when the case was in the midst of hearing at the Sessions, come with their *supersedeas* like a *certiorari*, and at once suspend all the proceedings. This is a power which this Court will hardly sanction. The removing Justices have no power to give costs in case parties are aggrieved by any order they may make. Therefore, if one parish had a desire to get rid of a pauper and his family for three months, it is only necessary for them to remove just after one Sessions and to supersede on the day before another and take back the paupers, by which the other parish is burthened with the expence of maintaining the paupers for three months, and left without redress. In this case, the removing parish ought to have known the sort of evidence upon which they proposed to remove the paupers, before they adopted a proceeding so burthensome to the opposite party; and they are not at liberty in almost the very last stage of the proceeding, to retrace their steps, upon finding that the parish removed to, is prepared with evidence to prove the settlement with the respondents. That evidence may be an aged person, who may be lost by death to the appellants when the question of settlement is agitated at a future period, and in the hope of which contingency, the

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respondents may withdraw their order, to remove again when it occurs. The Justices may, indeed, supersede their own order, *quia improvidè emanavit*, as was holden in *Pancras v. Rumbold* (a), and *Rex v. Smith* (b); but it must be before the removal of the pauper; after they cannot, and the reason is obvious. After the removal costs are incurred, which the Justices at Sessions alone can give, and the removing Justices shall not divest the appellants of the power to go to Sessions, and procure the payment of their expences from the only source that can give it, the former case seems to be a direct authority for this. There *Pratt*, C. J. said, that if the pauper had been removed, the *supersedeas* would have been void. Now, here the paupers had been removed before the *supersedeas* issued, and therefore the *supersedeas* is a nullity. If the respondents are now in a condition to examine the pauper's husband, the Sessions may adjourn the appeal till his imprisonment be at an end, and he purged of his incompetency. On principle and authority, therefore this rule must be made absolute.

BAYLEY, J. (c)—I am of opinion, under the circumstances of this case, that we ought not to grant a *mandamus*. The case of *Pancras v. Rumbold* (d) shews, that the Magistrates may, of their own authority, supersede, in case they shall be satisfied that they had improperly made the original order, and that they may supersede even in opposition to the wishes of the party who obtained it. This is an application of a different description, it is an application for a *mandamus* to compel the Justices to receive the appeal, and to enter continuances. Now I have no doubt that, under the circumstances of this case, the Sessions have a right to exercise a discretion whether the appeal ought to be received at all, or whether the party was or was not at liberty to abandon the order of

(a) 2 Bott, 638.

(b) Bulst. 343.

(c) *Abbott*, C. J. and *Holroyd*, J. were absent.

(d) 2 Bott, 638.

removal, and that they may deal with the case upon the application of the appellants, in such a way as may best answer the purposes of justice. If it appears before the Sessions, that expences have been incurred by the appealing parish, and the respondent parish, who resists the entering of the appeal, will not consent to pay such expences, why then the Sessions have a discretionary power to press the entering of the appeal, because in no other way can they give relief to appellants in order to reimburse them. But when they find that the respondent parish is willing to do every thing for the purposes of justice, it seems to me that the Sessions have a discretionary power to refuse to receive the appeal. There is no occasion for any decided case to establish this principle. If it appears that the Sessions have exercised a discretion in a matter which properly belongs to their jurisdiction, it is an invariable rule that we do not interfere. In the case of *Rex v. Diddlebury (a)*, Lord *Ellenborough* says, that the order may be abandoned by consent. It is said now in the argument in support of this application, that in order to give validity to such consent, it is necessary that there should be a consent on the part of the other parish to receive the abandonment. But Lord *Ellenborough* does not say that. All he says is, that it is sufficient if there be a consent on the part of the parish, in whose favour the order to abandon is made. In this case, after the order of removal was made, the parish who obtained it, gave notice to the appellants, on the 10th of *October*, that they would abandon; and in fact the order is not further pursued. I am quite satisfied that, within a very short time in this Court, there have been instances where orders have been obtained in which questions have been raised as to the effect of these abandonments; and whether, after there has been an express

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(a) 12 East, 361.

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abandonment, the order of removal could be considered as valid and conclusive with reference to the settlement; and that the Court has said that it was conclusive because the party had abandoned; and consequently that there was no necessity of appeal after abandonment. It is said that the respondents might go and enter continuances until the pauper's husband is discharged and becomes purged of his disqualification. *Cui bono?*—for if the respondents once abandoned the order of removal, finding that they had not sufficient materials to support it, the case is to be considered as if no order had been made; and therefore they remain in the same situation with reference to the settlement as if the continuances were entered until the man could be discharged. And indeed it is more beneficial to the appellant parish that continuances should not be entered, because they would have the burthen of maintaining the paupers until the witness was qualified; whereas, by waiting until the man was in a condition to be examined, the question might then be immediately heard and decided, when the Quarter Sessions might have a power ultimately of awarding costs and re-imbursing the appellants for all the expences they have incurred. Undoubtedly the respondents ought to have borne the expence incurred by the appellants up to the time when they gave notice of abandoning the order; and if an application had been made to the Sessions for those expences, I cannot but believe that the Justices would have made an order for that purpose. I think, however, that we should be going beyond our duty if we were to grant a *mandamus* in this case; and therefore the rule must be discharged.

BEST, J.—I think we should be deserting our duty, and departing from that principle upon which this Court grants a *mandamus*, if we were to make this rule absolute. The principle upon which this high prerogative is used by

the Court, is only to prevent the failure of justice. I think that if we were to grant the writ in this case, we should be promoting a failure of justice. The Sessions have wisely exercised the discretion vested in them; and it appears to me that, after the appellants are told by the respondents that they mean to abandon the order, the appellants ought not to have gone on with the appeal, thereby increasing those expences which are so loudly and so justly complained of in the discussion of settlement cases. Acting upon principle, I think this is a case in which we ought not to interfere.

Rule discharged, but without costs (a).

(a) Vide *Rex v. Llanrhydd*, Burr. S. C. 658. and *Chulbury v. Chipping Faringdon*, 2 Salk. 488.

The KING v. GEORGE LANE.

Thursday,
January 31.

WILLIAMS, J. last Term obtained a rule, calling upon the defendant to shew cause why a writ of *quo warranto* should not issue to compel him to shew by what authority he executed the office of constable of the township of *Aylesbury*, in the county of *Lancaster*; and

Cross, Serjt. now shewed cause against the rule. The only question in this case is, whether the defendant has been elected to his office of constable by proper and competent electors. It is not disputed that he was in fact elected—that he took the necessary oaths of office—and that having so done, he was compellable to serve; for it is quite clear, that having been elected and sworn in, his refusing to serve would have rendered him guilty of an offence, for which he would have been liable to be indicted and fined. But this question is one which cannot now

The office of constable being a burthen-some office, this Court will not put a person *de facto* elected, and sworn in by the court-leet, to the expence of shewing by what authority he holds the office, at the relation of a different body of persons claiming the right of election, where those persons do not shew an immemorial custom in their body to elect.

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be raised; for upon a similar application only last Term, in the case of the constable of *Oldham*, the Court said, that as the office was one of burthen and responsibility, and conferred no privileges or emoluments upon the party, they would not, under such circumstances, call upon him to argue his right. It seems, that in this township there are two separate bodies which claim the right to elect the constables, and the present application is an attempt to decide this disputed claim at the expence and trouble of the defendant. The defendant was elected at the court-leet by a jury, and sworn in before the steward of the Court; and it is objected that he ought to have been elected at the General Town Meeting. Upon general principles, and according to the prevalence of usage, the court-leet has the power of electing constables; and the case of *The King v. Barnard* (a) is directly in support of that proposition. At the General Town Meeting another individual was nominated and chosen; but he was never sworn in: and if it was wished to try the question of the right of election, the proper application would have been for a *mandamus* to compel the steward of the court-leet to swear in the person elected at the General Town Meeting. This principle is clearly laid down in the case of *The King v. Goudge* (b). The *primâ facie* right of election is in the court-leet; the defendant was elected by the jury of that court, and was sworn in by their proper officer: being thus elected, he was compellable to serve; and unless immemorial usage can be shewn of a right in the Town Meeting to elect, the defendant having been chosen to a laborious and burthensome office, should not be called upon, at his own personal trouble and expence, to argue his right to execute that office.

J. Williams, contra, being asked by the Court whether he was in a condition to prove an immemorial custom for

(a) 1 Ld. Raym. 94.

(b) Stra. 1213.

the Town Meeting to elect a constable, and for the court-leet to accept and to swear in the person so elected, and answering in the negative,

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BAYLEY, J. (a) said,—It may be a very proper subject of inquiry, whether the court-leet does or does not possess the right to elect a constable independently of the inhabitants assembled in a General Town Meeting, but I think that question cannot properly be raised before us by the present application. There is no sort of evidence produced before us now of an immemorial custom for the inhabitants to elect, and for the court-leet to accept the person by them elected, and, in the absence of such evidence, it would be going a great deal too far for us to presume the existence of such a custom. We are indeed bound to presume the contrary here ; and doing so we are bound to adopt a rule in this case, which may be considered as a precedent, and may prevent a renewal of similar applications. The office of constable is a burthensome office, and the individual elected is bound under a penalty for contempt to serve ; and therefore I think we ought not to call upon him to shew by what authority he does serve, at least until evidence is produced before us by the relators to prove that authority insufficient.

BEST, J.—I am altogether of the same opinion. The defendant has been, whether rightly or not, *de facto* elected to a burthensome office, which he could not refuse to accept and execute without exposing himself to serious consequences. Without proof that his election was bad, we cannot presume it to be so ; and it would be a great hardship, under such circumstances, to call upon him to support his claim to an office which he is compelled to execute. I think this rule must be discharged.

Rule discharged.

(a) Abbott, C. J. and Holroyd, J. were absent.

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Friday,
February 1.

ELSEE v. SMITH (in Error).

Falsely, maliciously, and without any probable cause, procuring the warrant of a Justice to search the premises, and apprehend the person of *A.* on suspicion of felony, and thereby causing his premises to be searched, and his person imprisoned, is properly the subject of an action on the case, and not trespass.

A positive oath that a felony is actually committed, is not necessary to justify a magistrate in granting his warrant to search the premises, and apprehend the person of a party suspected of felony; and though it may be *trespass* in the magistrate to grant an illegal warrant, yet it is *case* in the person who causes and procures such warrant to issue if it is done maliciously, and without reasonable or probable cause.

THIS was a writ of error from the *Common Pleas*. The declaration was in case. The first count alleged "that the plaintiff in error went and appeared before a Justice of the county of *Essex*, and falsely, maliciously, and without any probable cause, made a complaint on oath, that he had reason to suspect that several trees, or parts of trees, had been stolen from the King's Forest of *Hainault*, and that they were carried to the premises of *John Smith* (defendant in error), carpenter, of *Chigwell Row*, and were there concealed; and that he therefore prayed a search warrant to examine the premises of him the said *J. S.*; and that the plaintiff afterwards falsely, &c. caused and procured the said Justice to make and grant his warrant in writing, under his hand and seal, directed to the constable of *Chigwell*, and all other officers of the place, whereby, after reciting that the said *John Elsee* had made oath before the Justice that he the said *J. E.* had reason to suspect that a quantity of oak timber, the property of his Majesty, had been recently stolen from the King's Forest of *Hainault*, and that the said timber had been carried to, and was concealed on or near the premises of the said *J. S.*, the said Justice required such constables to search the premises of the said *J. S.*, and that they should bring the said timber, if so found, before him the said Justice, together with the body of him the said *J. S.*, to be dealt with according to law; and that by virtue and under colour of the said warrant, and under pretence of the execution thereof, the said defendant, together with one *J. W.*, a constable, proceeded to a certain place, near to the premises of the said *J. S.*, and then

and there the said defendant falsely and maliciously, and without any reasonable cause, pointed out to the said constable certain pieces of wood, then and there lying and being near to the said premises of the said plaintiff, to be oak timber, suspected to be feloniously stolen from the said forest of *Hainault*; and the said defendant, under colour and pretence of the said warrant, then and there caused and procured the said wood to be seized and taken, and kept for the space of twenty-four hours without any reasonable or probable cause; and the said defendant, on the same day, wrongfully and unjustly, and without any reasonable or probable cause whatsoever, caused and procured the said plaintiff to be arrested by his body, and imprisoned and kept for the space of twenty-four hours, and caused and procured him to be conveyed before the Justice aforesaid, who having heard all that the said defendant could say or allege touching and concerning the said supposed offence, adjudged and determined that the said plaintiff was not guilty of the said supposed offence; and the said defendant had not further prosecuted, but had deserted and abandoned the said complaint, and the prosecution was wholly ended and determined." The second count was more general, alleging, "that the defendant, without any reasonable or probable cause whatsoever charged the plaintiff with a certain offence punishable by law, to wit, that several trees, or parts of trees, severed from the ground, had been feloniously stolen, and that the said plaintiff was guilty of such felony, and upon such charge falsely, &c. caused him to be imprisoned for twenty-four hours." The defendant pleaded Not Guilty; and there was a general verdict and judgment for the plaintiff for 760*l.* 7*s.* damages and costs.

Assignment of errors, 1. That it is alleged in the first count of the declaration, that, by the information laid before the Justice, the defendant only prayed a search war-

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rant to examine the premises of the plaintiff, and therefore the defendant is not liable for the imprisonment of the plaintiff under the warrant of the Justice; 2. That the cause of action in the said first count mentioned, describes too generally the mode by which the defendant charged the plaintiff with the supposed offence; 3. That the mode by which the plaintiff was discharged or acquitted, is not stated in the said count, and no legal determination of the complaint against the plaintiff is stated or shewn; 4. That the proper remedy is *trespass* and not *case* for the supposed causes of action mentioned in the declaration; 5. That the complaint alleged in the declaration stated a mere suspicion of felony, and not a positive oath of an actual felony committed; and therefore the Justice was not warranted in issuing the warrant in the said declaration mentioned; and if not, then trespass was the proper form of action, if any was sustainable against the defendant, &c.

*Chitty*, for the plaintiff in error. The first and principal objection is, that the defendant below was not, under the circumstances stated on the record, liable to any action in any form of proceeding; and the second, that the form of action as well as the pleadings are incorrect; for if the injury complained of was committed under colour of a Justice's warrant, then the defendant was not liable; and if it was not under colour of the warrant, then the remedy should be trespass and not case. With respect to the first objection, it is clear, that if the Justice had no right upon the charge made before him to issue such a warrant, then the person making the charge is not liable to any action, and the remedy is only against the Justice. *Leigh v. Webb* (a), *Tempest v. Chamber* (b), and 24 Geo. 2.

(a) 3 Esp. 165.

(b) 1 Stark. 7.

c. 44. s. 6. If a magistrate grant a warrant without a proper information on oath, the remedy is an action of trespass against him. *Morgan v. Hughes* (a). Now a search warrant cannot be granted without a positive oath that a felony has been committed. 2 Hale P. C. 149, 150 and 113. *Entick v. Carrington* (b). By statute 22 Geo. 3. c. 58. s. 2. Justices are empowered, upon oath, that there is reason to suspect that stolen goods are knowingly concealed in any dwelling-house, to grant their warrant to search the same, and the person or persons knowingly concealing such stolen goods, or in whose custody the same shall be found, he being privy thereto, may be brought before the Justice. In the present case, the oath made by the defendant before the Justice does not positively state that the trees were actually stolen. The defendant merely swore that he had reason to suspect that trees or parts of trees had been stolen. His oath did not allege that the plaintiff had carried away or concealed such trees, and the defendant only prayed a search warrant. The defendant therefore is not responsible for the act of the magistrate, in adding more to the warrant than was prayed, which was merely a search for the trees, and at most the warrant ought only to have directed that the person or persons, knowingly concealing or being privy to the stealing the stolen trees, should be apprehended and brought before the Justice. The defendant did not impute to the plaintiff that he had concealed the trees; therefore the warrant was void; and the magistrate might be liable to an action of trespass; but the constable and the defendant were protected from liability by the common law, as well as by the statute, 24 Geo. 2. c. 44. s. 6. Then, secondly, the form of the action is clearly erroneous and mistaken, because, as the warrant to arrest the plaintiff was illegal, the proper remedy was trespass not case. *Hill*

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(a) 2 T. R. 225.

(b) 2 Wils. 291. 11 Hargr. St. Tr. 213.



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*v. Bateman (a), Morgan v. Hughes (b).* But, as to the imprisonment, it is not alleged in the declaration that that was under the warrant, which it was clearly necessary to have shewn (c). Thirdly, the second count is too general; for it merely alleges, "that the defendant without any reasonable or probable cause whatsoever; charged the plaintiff with a certain offence punishable by law, to wit, that several trees, or parts of trees, severed from the ground, had been feloniously stolen, and that the said plaintiff was guilty of such felony, and upon such charge falsely, &c. caused him to be imprisoned for twenty-four hours." Now it is not shewn in this count that the plaintiff was taken before a magistrate, which it is clearly necessary it should, nor that he caused him to be apprehended by warrant; and therefore it is clear that the declaration should have been trespass and not case. [The Court were inclined to think that the second count was free of objection.] In conclusion, the verdict in this case appears to have been taken for entire damages on the whole declaration, whereas it ought to have been taken specially, which was an omission at the trial. The first count manifestly proceeds to recover a compensation, as well for the imprisonment of his person and the supposed scandal of his character, as for taking wood and detaining it for twenty-four hours, without reasonable or probable cause. It is not stated, either that it was the plaintiff's wood, or that it was taken out of his possession. That cause of action therefore is not properly charged, and the damages being entire, the writ of error is well founded. *Playter's case (d), Wyatt v. Effington (e), Bertie v. Pickering (f), Pickney v. Rutland (g), and Jose v. Mills (h).*

(a) 2 Stra. 710.

(b) 2 T. R. 225.

(c) 2 Bla. Rep. 845. 3 Wils. 291.  
341. and 368.

(d) 5 Rep. 34.

(e) 1 Stra. 637.

(f) 4 Burr. 3455.

(g) 2 Saund. 579.

(h) 2 Ld. Raym. 890.

*Walford*, contra, was stopped by the Court.

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ABBOTT, C. J.—I am of opinion that the judgment in this case ought to be affirmed. Looking to the whole declaration, the inducement and the matters charged in the conclusion, it appears to me to be very manifest that the plaintiff does not seek damages for the taking of his goods, but he seeks damages for the injury done to his reputation and the imprisonment of his person; and therefore I think the verdict was correctly taken. That disposes of the objection as to the verdict. As to the other, which is the material objection in this case, namely, that this should have been an action of *trespass*, and not of *case*; that is founded on the supposition that the warrant, which the magistrate issued for searching the premises and apprehending the person of the plaintiff was illegal. Now if the warrant be not illegal and void in its form, and be founded on the matter laid before the Justice, and as he, as a Justice of the Peace, had authority to grant such a warrant, then the present action is proper in its form—for falsely and maliciously causing the magistrate to grant a warrant to do the act complained of. When the matter was laid before the Justice, he might lawfully and in the due exercise of his authority, grant the warrant prayed. What is the charge laid before him? That he “the said *John Elsee* had reason to suspect that several trees, or parts of trees, had been stolen from the King’s Forest of *Hainault*, and that they were carried to the premises of *John Smith*, carpenter, of *Chigwell Row*, and were there concealed.” It has been contended, that this would not justify the magistrate in issuing the warrant, which was afterwards issued, because there is no perfect allegation that the offence had been committed, but is only put as a matter of suspicion. It appears to me, on the authorities cited, speaking generally of the subject-matter, they do

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not contradict the opinion I have formed. I am of opinion, that upon a representation to a magistrate, that a person has reason to suspect that his property has been stolen, or is concealed in a certain place, the magistrate may lawfully issue his warrant to search the place, and to bring the occupier or owner before him. It need not be a positive and direct averment upon oath that the goods are stolen, in order to justify the magistrate in granting his warrant. There are many cases in which a cautious man might not choose to swear that his property is stolen, nevertheless he might have great reason to suspect a particular party, and the magistrate would be well warranted in granting his search warrant. Suppose the case of a horse, which has been lost by its owner, and it is found in the possession of another person, the owner in that case might not like to take upon himself to swear that the horse has been stolen; for it may have strayed; but when he finds his horse is concealed in the stable of another person, he may very naturally conclude that it must be stolen, from the circumstance of the concealment; and therefore he may conscientiously swear that he suspects it to have been stolen. If, under such circumstances, the magistrate is not authorised in issuing his search warrant, it might happen in many cases that felonies would go undetected. Therefore, it appears to me, that upon such information the Justice has authority to issue his search warrant; and, if it is wrongfully issued, the party who causes it to be issued must make reparation to the person injured. It being alleged in this declaration that the defendant falsely and maliciously made a charge against the plaintiff, and caused and procured a warrant to be issued, whereby the plaintiff is apprehended and unjustly imprisoned, it seems to me that the action is properly framed in case, and ought not to be trespass.

BAYLEY, J.—I am of the same opinion. If a party acts himself in apprehending another, he may be liable in trespass; but if he falsely and maliciously, and without any probable cause puts the law in motion, that is properly the subject of an action on the case. With that all the authorities agree. The allegation in this case is no more than that the defendant did falsely and maliciously, and without probable cause, put the law in motion against the plaintiff. It is alleged, that he made a complaint before the magistrate, in which he stated he had reason to suspect that several trees and parts of trees had been stolen from the King's Forest, and concealed on the premises of the plaintiff, and that he falsely and maliciously caused and procured the magistrate to issue this particular warrant; which warrant states that the goods were suspected to be carried to, and were concealed on or near the premises of the plaintiff. The warrant is so framed in order to meet the possible case, that if the trees had been originally carried to the premises, they would be removed to some place near them, so as to be convenient within the reach of the party who originally concealed them. Now if the defendant falsely and maliciously procured the warrant to be made out, he caused and procured it to be made out in the way alleged. There is no positive allegation that the property had been stolen, nor need there be any, to justify the warrant; for I take it to be quite clear, that it is not essential, in order to give the magistrate jurisdiction, that the party should take upon himself absolutely to swear that a felony is committed; but if he states that he has just cause to suspect a particular person, and upon that representation a warrant is improperly granted, that forms the foundation of an action in case; and it does not lie in the mouth of the party so acting to say that the warrant is improperly granted. He makes the charge, and he prevails upon the Justice to issue his warrant; and,

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upon that warrant being issued, he has no right to say, "I am not liable for the consequences; because, true it is, I caused and procured the Justice to issue his warrant, but the charge was not sufficient to authorize the Justice to do what I required him." I think that affords him no ground of defence. I am of opinion also that there is nothing in the other objections. This is the case of a person maliciously and without probable cause putting the law into motion; and as that is the proper subject of an action on the case, I think there is no error on this record.

HOLROYD, J.—I think there is no error in this case, and that the judgment ought to be affirmed. The action is for a malicious prosecution, in consequence of which a warrant issues. If the warrant issued without due authority on the part of the magistrate, that would be trespass in the magistrate; but it by no means follows that it is trespass in the party, who, by laying the information before the magistrate, is the cause or instrument on which the magistrate acts in granting his warrant. He lays a statement before the magistrate of suspicion of the goods being stolen, and that they were carried to the premises of the plaintiff, and there concealed, and he pray a search warrant to examine the plaintiff's premises. He does not, from any thing that appears on the face of the declaration, pray this specific remedy by warrant for the apprehension of the plaintiff. Now, if the declaration had stated that the defendant had gone before the magistrate, and prayed for a search warrant on a specific charge of felony, then there might have been some colour for arguing that the declaration ought to have been in trespass. It is said that the granting the warrant is the act of the magistrate, and that, if any action lies, it is trespass against him, and that the party who made the re-

presentation upon which the magistrate acted is not liable. I think otherwise. The defendant is answerable in case, for falsely and maliciously, and without probable cause, making such a representation to the magistrate as induces him to grant his warrant. If the warrant was illegal, and the defendant himself went with the officer to execute it, that might make him a guilty trespasser; but it does not appear to me that there was any thing illegal in the warrant itself. There is nothing in this declaration which will make him a trespasser, although he was present when the warrant was executed. It is only that he caused and procured the warrant to be executed, which would be the case, supposing he had, by the means alleged, caused and procured the warrant to be executed. On this ground, therefore, I think there is no error. I concur with the rest of the Court in thinking that there is nothing in the objection as to the mode in which the verdict was taken.

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BEST, J.—Was of the same opinion.

Judgment affirmed.

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The KING v. THOMAS RIDEWAY.

Quashing a conviction on a penal statute, for mere matter of form at Sessions, is not an acquittal of the defendant, concluding the case against any further inquiry in this Court.

Where the Quarter Sessions, on appeal, quashed a conviction of the defendant, on stat. 39 & 40 Geo. 3. c. 102, for want of form *subject to the opinion of K. B. upon the point of form*: Held, that the order quashing the conviction might be quashed, and the appeal sent down to be tried on the merits, even though there was nothing on the face of the proceedings shewing that the conviction was quashed for form, and that the Sessions desired the opinion of the Court upon the point.


The stat. 39 & 40 Geo. 3. c. 106. s. 4, enacts, that all persons who shall attend any meeting had or held "for the purpose" of making or entering into any contract, &c. by this act declared to be illegal, or of entering into, &c. any combination for any purpose declared by this act to be illegal, &c. Held, that a conviction for attending a meeting "for the purpose" of carrying on a combination "for the purpose" of obtaining an advance of wages, correctly described the offence by the words "for the purpose" though the description of offence referred to in the fourth section was described in the third section to be "any combination to obtain," the words "for the purpose" and "to obtain" being synonymous.

THIS was a rule calling on the defendant to shew cause why an order of the *Lancashire* Quarter Sessions, quashing a conviction upon the statute 39 & 40 Geo. 3. c. 106. s. 4. should not be quashed. The defendant had been convicted on information before two Justices, of attending a meeting of journeymen bleachers, held for the purpose of maintaining, supporting, continuing, and carrying on, a combination for the purpose of obtaining an advance of wages. On appeal, the Sessions quashed the conviction, subject to the opinion of this Court, upon an objection taken to the form of the conviction.

*J. Williams* and *Denman* now shewed cause against the rule, and submitted, as a preliminary objection, that the Court could not entertain this rule, inasmuch as the defendant had been, in point of form, acquitted by the Sessions, as appeared by their record, returned to the *certiorari* issued in this case. If the conviction has been quashed, it is contrary to the rule in all criminal cases that the defendant should be a second time put in jeopardy for the same offence. The quashing of the conviction is to all intents and purposes an acquittal. This is a criminal proceeding against the defendant, and the first question therefore is, whether the Court will entertain a

that the Sessions desired the opinion of the Court upon the point.

motion which must in its consequences subject him to a second trial for the same offence. In all criminal charges, an acquittal is a bar to further proceedings against the party, and even in cases of misdemeanor where the defendant has been acquitted in consequence of a mere clerical objection, still it has been held, that no new trial can be had. In this case, the defendant has been in fact acquitted; whether properly or not, is not the question; he is entitled to the benefit of his acquittal, and ought not to be subjected to a second trial.

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ABBOTT, C. J.—I am not aware of any case in which the point now contended for has been decided. I have a perfect recollection of cases having occurred formerly, in which orders of removal have been quashed for form by the Quarter Sessions, subject to the opinion of this Court, whether the original order was right. Where the Justices have declared, that they have quashed for form, then in such cases this Court has considered whether the form was correct. Now, here the Justices have declared that they have quashed this conviction for form, subject to our opinion upon the matter. Is there any distinction between this case in principle, and those cases to which I have alluded?

*J. Williams and Denman.*—Many cases, of the description alluded to by the Court, have occurred; but there is a main distinction between orders of removal and convictions upon penal statutes. In the one, if the order of removal be irregular and is quashed for irregularity, a fresh order of removal may be made out, for, as between two contending parishes, an order of removal quashed for want of form, would not prevent a fresh removal; and in such cases a special entry is made by the Clerk of the Peace, that the order is quashed for form.



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Under these circumstances, in such cases, the matter of form has been remitted for the opinion of this Court. But there is no analogy between an order of removal of a pauper and a conviction on a penal statute. No penal consequences attach to the former, and, therefore, there can be no harm in this Court reviewing the decision of the Sessions; but a case has never yet occurred in which this Court has interfered to set the Sessions right in a criminal matter, where the decision of the Justices was in favour of the defendant.

*The Court* intimated a strong opinion that the objection was not tenable, the Sessions having expressly qualified their decision, by declaring that they had quashed the conviction for form; and, therefore, directed that the counsel should proceed to the objection arising on the face of the conviction itself.

*J. Williams and Denman.*—Then the objection is, that there has been a misdescription of the offence upon the face of the conviction, and that it states no offence within the terms of the statute upon which the proceeding is founded. It is entirely an objection in point of form. The cases of *Rex v. Allen* (a), *Rex v. Redfearn* (b), and *Rex v. Cook* (c), are the leading cases to be referred to upon this subject, but in all those cases the opinion of the Court was taken upon points reserved on facts, and not as to the form of the conviction. The question here is, whether, in point of form, there is a proper description of the offence with reference to the statute upon which the conviction is founded. Upon the face of the conviction the offence is, “for attending a meeting held ‘*for the purpose*’ of maintaining, supporting, continuing, and

(a) 15 East, 333.

(b) 4 T. R. 273.

(c) 3 T. R. 519.

carrying on, a combination of journeyman and workmen in the business of bleaching, ‘*for the purpose*’ of obtaining an advance of wages in that business.” By the s. 4. of 39 & 40 Geo. 3. c. 106, it is declared, “That any person who shall attend any meeting had or held *for the purpose* of making or entering into any contract, covenant, or agreement, by *this act declared to be illegal*, or of entering into, supporting, maintaining, continuing, or carrying on, *for any purpose* by this act *declared to be illegal*, &c. shall,” &c. be subjected to the penalties therein mentioned. So that the objection comes to this; whether or not the meeting is accurately described to be a meeting “*for the purpose*” prohibited by a previous part of the statute. The species of combination which is prohibited by the third section of the statute, and to which the fourth section refers, is “any combination ‘*to obtain*’ an advance of wages,” &c. The conviction therefore is clearly defective and bad in form, in not accurately describing the offence contemplated and designated by the legislature, inasmuch as it does not state that the combination was “to obtain.” In all criminal proceedings founded upon statutes, the precise language of the act must be adopted; it is not sufficient to make use of words that might possibly convey the same meaning; that meaning must be made clear beyond the possibility of doubt; to effect that object the legislature select their own words, and those words are not to be departed from even in sound. It is laid down as a general rule, in *Hawk. P. C. b. ii. c. 25. s. 110*, that unless the statute be recited, neither the words *contra formam statuti*, nor any periphrasis, intendment, or conclusion, will make good an indictment which does not bring the offence within all the material words of the statute (a). The offence in the present case is a com-

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(a) Vide 1 Stark. Cr. Pl. 206.

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bination "*to obtain*," i.e. "that is likely to obtain," "which has a tendency to obtain," increased wages. To describe this offence as being "*for the purpose*" of obtaining that object, is clearly insufficient; for there may be "the purpose," without the tendency, or even the capacity in the party to effect the object. The only safe and proper rule, therefore, is, to pursue the precise words of the statute. In *Rex v. Neild* (a), which was a conviction on another branch of the same statute, Lord Ellenborough, C.J., says, "It is not enough that the agreement should be *for the purpose*, that is, with intent to control; but it must be entered into *for controlling*, that is, for effecting that object." This is an authority in point, and one entitled to the greatest weight; shewing the importance of adhering to the precise language of the statute. But great injustice may be done to the defendant by entertaining the present motion. Any charge founded upon this statute must be made within three months after the supposed offence is committed, and an appeal from a conviction before the Magistrates must be entered at the next General Quarter Sessions, so that if the present case be sent back to the Sessions, the defendant will be barred of his appeal by the mere lapse of time.

*Scarlett, contra.*—This is a question of law, and the Court of Quarter Sessions are perfectly entitled to take the opinion of this Court upon it. There are some few cases in which a strict and literal adherence to the words of the statute is declared to be necessary, but they are capital cases, and the rule is founded on a tender and anxious regard for life; but in offences of a lighter kind any words that bring the party within the plain and ob-

(a) 6 East, 417.

vicious meaning of the law are sufficient. The argument on the other side is manifestly absurd, for it would ask the Court to forget the spirit of the law and adhere to the letter only, to regard the sound and neglect the sense of the enactment.

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*Starkie*, on the same side, was stopt by the Court.

ABBOTT, C.J.—I am clearly of opinion, that we are bound in the exercise of our judicial authority to quash this order of Sessions, if upon the face of it, it appears to be founded on an insufficient ground; and I should be of the same opinion, whether the Sessions had or had not specially asked our opinion upon the question. Supposing no case to have been reserved by the Sessions, but that their order and the original conviction on which it was founded had been brought before us by *certiorari*, it would be our duty to read the order, and if we saw by the terms of it that they had quashed the conviction for informality or insufficiency, then to read the conviction, and if we found it not to be informal, then to send it back for re-hearing upon the merits. No injustice can arise to the defendant by our sending this case back to the Sessions, for as his appeal against the original conviction was entered within the time limited by the act, no subsequent delay can bar him from being heard on that appeal upon the merits. The question before us is, whether there is or is not an informality in the form of the conviction? That question is to be determined by referring to the words of the statute, upon which the conviction proceeded, and if we find that the conviction states an offence within the words, although it may not have pursued the identical words, yet we are bound to say it does all that is required by law. There is no man who entertains a greater reverence for every thing that fell from my


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Lord *Ellenborough*, sitting in this place, than I do; I cannot, however, help saying, that the observation made by him, in *The King v. Neild* (a), (and which certainly was not the foundation of the decision there) is not satisfactory to my mind. My Lord *Ellenborough* appears there to have affirmed, that the words "*for the purpose of controlling*" following the word "agreement," is not a sufficient allegation to shew that the agreement was *for controlling*, that is, for effecting the illegal object; and, therefore, in that view of the case it occurred to his mind, at that time, that the expression used on that occasion was not equivalent to the language of the act of parliament; but on looking to the act of parliament, I think the legislature themselves have told us that a combination, *to obtain* an advance of wages is an agreement *to do it*. The words of the third section are "That every journeyman, or workman, &c. who shall enter into any combination *to obtain* an advance of wages, &c. or *for any other purpose*, contrary to the provisions of this act, shall," &c. Now, a combination "to obtain," is a combination "for the purpose" of obtaining. They are convertible terms, and it is the same as a combination "for the purpose." The words "for the purpose" shew in what sense the legislature have used the word "purpose." It is used not in the sense of "intention," but "object and intention." When we look at the fourth section upon which this conviction is founded we find these words, "All persons who shall attend any meeting had or held *for the purpose* of making or entering into any contract, covenant, or agreement, *by this act declared to be illegal*, or of entering into, supporting, maintaining, continuing, or carrying on any combination *for any purpose declared by this act to be illegal*, &c." Here again we must intend that the word

(a) 6 East, 417.

"purpose," means the "object" of the combination, and not the "intention." Reading this fourth section, I must look into the act of parliament, to see what purposes of combination are there declared to be illegal. I see that the obtaining an advance of wages is one of the *purposes* which the legislature have declared unlawful. That being so, if this defendant has attended a meeting held *for the purpose* of obtaining an advance of wages, he is within the terms of the statute, and the conviction is right in point of form.

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BAYLEY, J.—I entirely agree with the opinion expressed by the Lord Chief Justice. The case of *Rex v. Neild* (a) is not an authority in the present case; the objection to the conviction there was, that the agreement was not set out, and, therefore, that the alleged offence was not described at all. I agree with the dictum in *Hawkins* (b), that any words which do not sufficiently describe the offence are bad, but a variation from the precise words of the statute, in my opinion, is not fatal, if the words used are such as bring the case within the plain meaning of the act of parliament. But in the present case the statute itself justifies the adoption of the very words that are complained of, for, upon comparing the third and fourth clauses of the act, I perceive that the words "to obtain" and "for the purpose of obtaining," are used synonymously. Upon these grounds, I am of opinion, that the conviction in this case was improperly quashed, and that it is our duty to send the appeal back to the Court of Quarter Session, in order that it may be heard there upon the merits.

BEST, J. (c)—The Court of Quarter Sessions have only quashed the conviction in this case conditionally,

(a) 6 East, 417.

(b) Hawk. P. C. b. ii. c. 25. s. 110.

(c) Holroyd, J. was absent at Chambers.

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that is, subject to the opinion of this Court, and we are, therefore, bound to send it back to them that the question may now be tried upon its real merits. I think there is no solid objection to the form of this conviction, because its language clearly brings the offence within the meaning of the statute. The dictum in *Hawkins*, can hardly be considered as applicable to the present case, for I apprehend the words quoted from thence refer rather to a recital of the act of parliament than to a description of the offence.

Rule absolute.

Wednesday,  
February 6.

The KING v. The INHABITANTS of WILMINGTON.

On a question of emancipation, the Court laid down this general rule, in order to exclude discussions in particular cases in future, "that  
"no eman-  
"cipation is  
"effected,  
"during mi-  
"nority, ex-  
"cepting by  
"marriage,  
"becoming  
"the head of  
"another fa-  
"mily, or con-  
"tracting a re-  
"lation such  
"as wholly and  
"permanently  
"to exclude  
"the father's  
"control."

BY an order of two Justices, *John Moore*, his wife, and one child, were removed from the parish of *Crayford* to the parish of *Wilmington*, both in the county of *Kent*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case :

The pauper *John Moore*, never did any act by which he acquired a settlement in his own right. In the year 1814, the pauper was removed with his father, *Thomas Moore*, by an order of two Justices, from the parish of *Crayford* to the parish of *Wilmington*, as the place of settlement of the pauper's father, which order was appealed against, and upon the hearing of the appeal confirmed. The pauper in the same year returned with his father into the parish of *Crayford*, and was hired by the week to Sir *Henry Crewe*, in that parish, in whose service he continued as a weekly servant for nearly two years. Upon leaving the service of Sir *Henry Crewe*, he followed the occupation of mole catching in the parish of *Crayford*,

by which he obtained his own living. He never resided with his father's family, nor did his father exercise any control over him. In the latter end of the year 1815, when the pauper was about seventeen, his father left *Crayford*, and went to live first at *Poplar*, in a tenement at four shillings per week, where he continued about eight months, and in or about the month of *February*, 1817, went to *Bow*, where he rented a house and orchard at 20*l. per annum*, and in which he still continues to reside. Whilst the pauper followed the business of mole catching at *Crayford*, he used occasionally to visit his father both at *Poplar* and at *Bow*, and once slept at the father's house in *Poplar*, but he did not receive any maintenance or assistance whatsoever from his father. After the father had occupied the house at *Bow* for rather more than a year, the pauper, who was then about nineteen years of age, married his present wife. The question for the opinion of the Court is, whether the pauper, before his marriage, was emancipated by his earning his own livelihood in the manner above-mentioned in the parish of *Crayford*.

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Bolland, in support of the order of Sessions, contended, that the pauper was emancipated by reason of his having wholly ceased to be under the control of his father, when he went into the parish of *Crayford*, to gain his own livelihood, as stated in the case. He admitted that there were contradictory decisions in the books upon the question of emancipation, and he referred to *East Woodhay v. West Woodhay* (*a*). *Rex v. St. Michael in Norwich*, and *St. Matthew v. Ipswich* (*b*), and *Rex v. Walpole, St. Peter's* (*c*), as authorities in favor of this argument. He endeavoured to distinguish this case from *Rex*

(*a*) 1 Stra. 438.(*c*) Bur. S. C. 638. 2 Bott. 44.(*b*) 2 Bott. 40.

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v. *Whitton cum Twambrookes* (a). He also relied upon *Rex v. Roach* (b), and referred to *Rex v. Woburn* (c), *Rex v. Cold Ashton* (d), and *Rex v. Ockchurch* (e).

Berens, contra, was stopped by the Court.

ABBOTT, C. J.—The question as to what is called emancipation in the settlement law does not arise properly in any case where a person during minority has gained a settlement of his own. The question of emancipation arises only where during minority the party has gained no settlement. The question is, how long he shall be considered as continuing a part of his father's family, and following the settlement which his father has gained? It is of great importance to lay down some general rule upon this subject, in order to exclude discussions of this kind in particular cases, and I own it appears to me, the best general rule to lay down, is, to say—That there is no emancipation during minority, excepting by marriage, becoming the head of another family, or contracting a relation such *as wholly and permanently* to exclude the father's control. In my opinion nothing of that kind has occurred in this case, and therefore I think the order of Sessions ought to be quashed.

BAYLEY, J.—I am of the same opinion. Looking through the different authorities in the books upon the question of emancipation, it will be found that they all fully warrant the rule laid down by my Lord Chief Justice.

BEST, J. (f) also concurred.

Rule absolute.

(a) 4 T. R. 355. 2 Bott. 53.

(b) 2 Bott. 57.

(c) Id. 726.

(d) 2 Burr. 444. 2 Bott. 43.

(e) 2 Bott. 50.

(f) *Helroyd*, J. was absent.

1822.

Friday,
February 8.

The KING v. DOLBY.

THIS was an indictment against the defendant for an alleged libel, prosecuted at the instance of a Society called *The Constitutional Association*; and at the *Middlesex* Sitzings after last *Michaelmas* Term, before *Abbott*, C. J. it stood for trial by a Special Jury, which had been regularly struck in the Crown Office. When the indictment was called on for trial, but two of the special jurymen attended, upon which the counsel for the Crown prayed *a tales*. The defendant's counsel then challenged the array for unindifferency in one of the sheriffs by whom the panel was returned, on the ground that he was a subscriber to the Association, at whose instance the prosecution was conducted, at the time the jury process was returned. The Court upon that appointed the two special jurymen, who had appeared, as tryers of the matter of challenge, and they having found that the sheriff was unindifferent, the panel was ordered to be quashed, and the cause was struck out of the paper.

Where, upon a challenge to the array for unindifferency in the sheriff, the jury panel was quashed: Held, that the proper course to obtain a trial of the cause, is to direct new jury process to the coroners of the county, at the instance of the prosecutor, but not without applying to the Court specially for that purpose.

Tindal, on a former day, obtained a rule to shew cause why a *venire facias de novo* should not be directed to the coroners of the county of *Middlesex*, to return a new panel, in order that it might be annexed to the record when the cause should be again set down for trial; suggesting, that there was no other mode by which a trial could be obtained during the shrievalty of the sheriffs who returned the former panel, they being still in office. Notice of the rule had been served upon the defendant, and now

Scarlett and *J. Evans* shewed for cause against the rule, that this was not the proper mode of proceeding, in-

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asmuch as it ought to have been a rule to shew cause why there should not be a suggestion entered on the record of what took place when the cause was laid down for trial, when the Court, as a matter of course, might direct a new jury process to the coroners of the county. There was no occasion to call upon the defendant to shew cause against the present rule, because he could be no party to the proceedings, and therefore he was brought here unnecessarily.

The Court said, the defendant need not have appeared unless he thought proper. He was not bound to appear; the notice of the rule was only served upon him to give him the opportunity of suggesting any objection to the course adopted, if any could be suggested. The present application was in the regular and ordinary course of proceeding. It had been suggested that one of the sheriffs was an interested person, and in that case the course was to award new jury process to the coroners; but this could not be done without a rule to shew cause, and as no sufficient cause could be shewn against it, the rule must be made absolute.

Rule absolute (a).

(a) Vide 35 Hen. 8. c. 6. ss. 6, 7, 8. 4 & 5 Ph. & M. c. 7. 3 Geo. 2. c. 25. ss. 8. 11. 18. 19. Bac. Abr. tit. *Juries*, 68, *Trials per Pais*, 68. Saund. 2. 349, note 1. Hawk. P. C. lib. ii. c. 9. s. 85.

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Friday,
February 8.

The KING v. The JUSTICES of COLCHESTER.

THIS came on upon a rule to shew cause why a *mandamus* should not be directed to the defendants, commanding them, at the next General Quarter Sessions, to receive, hear, and determine an appeal, against the allowance of the accounts of the late overseers of the parish of ———, within the borough of *Colchester*. The rule was obtained upon an affidavit, stating, that the appellants having reason, as they alleged, to be dissatisfied with the allowance, caused an appeal to be entered against the same at the last Quarter Sessions; but that the Justices dismissed the appeal, upon the ground, that the accounts had not previously been allowed at a *Special Sessions* under the provisions of the 50 *Geo. 3. c. 48. s. 1.*

Mandamus issued to receive an appeal against overseer's account, though the allowance had not been previously made at a *Special Sessions*, under 50 *Geo. 3. c. 49. s. 1.*

Knox and *Walford*, now shewed cause against the rule, and relied upon *Rex v. Whitear (a)*, which decided that Quarter Sessions have no jurisdiction to make an original order for late overseers to pay monies to their successors, and which was confirmed by *Rex v. Bartlett (b)*; in which it was holden, that there must be a previous allowance by two Justices before the Sessions can entertain an appeal against overseers' accounts. Before the 50 *Geo. 3. c. 48. s. 1.* it was necessary to comply with the requisites of 17 *Geo. 2. c. 38*, in order to give the Sessions jurisdiction; but that statute, in the particular of the mode of allowing overseers' accounts, was repealed by the 50 *Geo. 3.* Under the 43 *Eliz. c. 2. s. 2.* and the 17 *Geo. 2. c. 38*, the

(a) 3 Burr. 1356.

(b) Stra. 983.

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functions of Justices were wholly ministerial and the term *allowance* of accounts was an incorrect one, the act done by the Justices amounting to no more than a mere *attestation*. But now by the 50 Geo. 3. c. 49. every overseer's account is to be submitted to two or more Justices at a *Special Sessions*, to be held for that purpose, and they are required to examine such accounts, and disallow all such charges and payments as seemed to them exorbitant. The functions of Justices on this subject are therefore now entirely judicial. In the present instance no *Special Sessions* was holden, and no examination of the accounts under the 59 Geo. 3. c. 49. took place. It is not a question here what was the duty of the last overseers, but simply one of jurisdiction. The allowance they procured not being according to the provisions of the 50 Geo. 3. which has substituted a different course of proceeding, and repealed the former, it must be taken as if no allowance had been made at all; and then the parties come *per saltum* to the Sessions, which is clearly irregular according to the decided cases.

*Jessopp and Brodrick*, contra, were stopt.

*The Court* (a) thought that the Justices below were mistaken in supposing that they had no jurisdiction in this matter, as in point of fact there had been an allowance before two Justices, though not at a *Special Sessions*, and directed the *mandamus* to be issued.

Rule absolute.

(a) *Best*, J. was absent at Chambers.

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The KING v. The MAYOR and JURATS OF HASTINGS.

Friday,  
February 8.

**COURTHOPE** had obtained a rule calling on the Mayor and Jurats of the Town and Borough of *Hastings*, being without one of the Cinque Ports, to shew cause why a *mandamus* should not issue to compel them to hold a Court of Record for the recovery of debts, within the said town and borough, pursuant to the terms of the charter of incorporation.

*F. Pollock* now shewed cause against the rule. The defendants had no objection to hold the Court, if by law they were bound to do so; but as it appeared to them that no possible utility would result from it, and as it would be productive of much inconvenience, they wished to have the opinion of the Court upon the subject. The relator in this case was an attorney, who had some time since called upon the defendants to admit him as an attorney of the Court of Record in the borough, and to issue process for the arrest of a debtor, which they refused; and he was not joined in the present application by any of the inhabitants of the town, or by any member of the corporation. Upon the relator's first application, the town clerk proceeded to search the records of the borough, and found that no court had been held there since the year 1770; and upon further inquiry he learnt that no such court had been held in any other of the Cinque Ports during the memory of any living person. The words of the charter are, "that the Mayor and Jurats of every ancient town belonging to the Cinque Ports might for the future hereafter have and hold, and have power to have and hold, at some convenient place,

If there are words of permission in a charter to do an act which is clearly for the public benefit, they are obligatory; therefore where a charter declared that the mayor and jurats of an ancient town might hold a court of record for the holding of pleas, but which had been long disused, the Court granted a *mandamus* to compel such Court to be held at the instance of an inhabitant of the town, though he was not a corporator.

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one court of record, and that the same Mayor and Jurats, and their successors respectively, might and should have in any of the said courts severally and respectively more fully and firmly than formerly, authority by that charter, to hear and determine, &c. and the said Mayor and Jurats should upon all pleas, actions, complaints, &c. have power to compel appearance by summons, &c." So that the charter only empowers the holding of the court, but does not enjoin it. Under these circumstances, and considering the long disuse which had prevailed, this rule must be discharged.

*Courthope*, *contra*, was stopt.

*Per Curiam*.—Words of permission in an act of parliament, if tending to promote the public benefit, are always held to be compulsory. If there exist any good reasons for not holding the court, they may be returned to the *mandamus*; but if there are no such reasons, the interests of the inhabitants must be respected. The court was evidently intended for their benefit, and is likely to promote their benefit, and it would be great injustice to narrow their privileges by discharging this rule. We are all of opinion that the inhabitants of this port have an interest in the holding of this court, and although the relator in this case is not a corporator, yet we think the corporation ought to hold the court for the benefit of the inhabitants, for it is clear they have power so to do under the charter. It may be of great benefit to the inhabitants that there should be a jurisdiction conducted according to the ancient common law of the country. It is by the disuse of so many of these courts, that the legislature have found it necessary to institute new modes for the recovery of debts, not so well known in the ancient constitution.

Rule absolute.

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*Ex parte* THOMAS WHITE and THOMAS GIBBS.Friday,  
February 8.

**W**RITS of *habeas corpus* having issued on a former day, directed to the Admiral of the Fleet at *Chatham*, to bring up the bodies of the prisoners, seamen, who had been impressed under 57 Geo. 3. c. 87. s. 6, it was agreed, that instead of making formal returns, *Jervis* should move to discharge the writs *quia improvidè emanaverunt*, and that *Turton* should shew cause against that motion in the first instance.

By statute 57 Geo. 3. c. 87. s. 6, it is declared, "that if any person liable to be arrested under any of the acts for the prevention of smuggling, shall be fit and able to serve his Majesty in his naval service, and liable under the said acts to be impressed into such service, every such person so arrested shall be taken before a justice of the peace, and shall, upon due proof, be committed to prison to answer such information, and abide such judgment as may be thereon given against him in that behalf; and that it shall be lawful for the gaoler, &c. on the order of the commissioners of customs or excise respectively directing the prosecution, to carry and convey such person on board any of his Majesty's ships of war, in order to his being impressed into his Majesty's naval service." Under this section of the statute the prisoners had been committed by a justice of the peace, and in pursuance of an order signed by four of the commissioners of his Majesty's customs, they were carried and conveyed on board a King's ship, and under such order impressed to served in his

By statute 57 Geo. 3. c. 87. s. 6. persons liable to be arrested under the acts for the prevention of smuggling, and who are fit and able to serve on board a King's ship, shall be taken before a Justice, and upon due proof be committed further to answer, &c. and after being so committed, the gaoler in whose custody they are kept, is authorised on the order of the commissioners of customs or excise, respectively, to convey them on board a ship of war, in order to their being impressed. Where persons were impressed under the authority of this act, by virtue of an order signed by only four commissioners of customs out of the nine nomi-

nated and appointed by the King's patent: Held, that such order was valid and effectual, it appearing by the patent that four of the commissioners might act for the whole body, and therefore the Court refused to discharge the prisoners out of custody.



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*Ex parte*  
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 and GIBBS.

Majesty's navy. These facts were brought before the Court on affidavits, and annexed thereto was a copy of the royal patent appointing nine commissioners of customs to execute the powers mentioned in the statute.

*Jervis* now moved to discharge the writs of *habeas corpus*, on the ground that they had been improvidently granted. The question in this case is, whether the order signed by four commissioners of his Majesty's customs is sufficient to warrant the detention of the prisoners. In the first place, s. 6, of the act, under which the prisoners have been committed, does not require that the order for taking the offender on board a ship of war, shall be an order of all the commissioners, but it simply says, "that it shall be lawful for the gaoler, on the order of the commissioners, to convey the person on board." Now by no necessary construction can that mean that the order shall be signed by *all* the commissioners, and indeed nothing could be more unreasonable than to require that the order of the whole body should be necessary to give validity to the proceedings. But the short answer to the objection is, that the King's patent appointing the commissioners, authorizes any four of the nine to act for the whole body. Therefore, coupling the provisions of the act of parliament with the patent, the order in this case was perfectly valid, and consequently the Court must discharge the writs *quia improvidè emanaverunt*.

*Turton, contra*.—By the true construction of the section of the statute under which the prisoners have been impressed, it is perfectly obvious, that the order for their detention, ought to have been signed by all the commissioners, or at least by a majority of them, to render it effectual. This is clear from the circumstance of there being no limitation in that clause with respect to the

number of commissioners who are to be competent to act. The order is to be issued by "*the* commissioners" generally. Now this construction is the more reasonable, when the Court looks to other sections of the act of parliament under which the commissioners are empowered to act. In some it is declared that *three* only, and in others *five*, shall have power to act. This shews the legislature contemplated different cases in which the commissioners might be required to act in a body or in part, according to the circumstances of the particular case. Contrasting, therefore, those clauses with the clause in question, there can be no doubt that the legislature intended that the whole number of commissioners should act in pursuance of the authority given in that section. This is a highly penal act of parliament, empowering the commissioners to cause persons committed under it to be detained five years on board any of the King's ships, and therefore it ought to be construed most strictly. If the majority of the commissioners had joined in this order, probably the objection could not be supported, but to say that the minority shall bind the majority is contrary to all principle, and is evidently at variance with the reasonable intendment of the legislature. In the case of a corporation, or other body politic, it has been decided that the majority will bind the minority. *Cooke v. Loveland* (a), 1 Bulst. 105.. *Grinley v. Barker* (b), and *Rex v. Foxcroft* (c). But where a mere naked authority is to be exercised, the concurrence of all those to whom the authority is committed, is requisite. At all events a majority in all cases is necessary to render the act of the body valid and effectual. In this case there has only been the concurrence of the minority, and consequently the prisoners are entitled to their discharge for this informality in the proceedings.

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(a) 2 Bos. &amp; Pul. 31.

(c) Burr. 1017.

(b) 1 Bos. &amp; Pul. 229.

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ABBOTT, C. J.—The question is, whether the provisions of the act of parliament are inconsistent with the patent; if not, the act must prevail. The cases which have been cited have no bearing upon the question. Referring to the act of parliament, and to the language of the patent, I think this point is much too plain for argument.

BAYLEY, J.—This is a mere question of construction as to what shall be considered as the order of the commissioners of customs or excise. The legislature says it shall be lawful for the gaoler, on the order of the commissioners of customs or excise respectively directing the prosecution, to convey the person on board of a ship of war, in order to his being impressed. For the purpose of seeing what is meant by the order of the commissioners of customs and excise, we must look to their authority, which is derived from the Crown, and see who are constituted commissioners of customs, and who are capable of making an order in such character. Referring to the royal patent, by which their authority is created, and by which alone they are to act, it is said, that there shall be nine in number, but that four of those nine shall be competent to act for all purposes for which their authority is created, and that the act of four shall be the act of all. In this case four of the commissioners have acted, and therefore I think the order by which these men were impressed, is perfectly unobjectionable.

HOLROYD, J.—The meaning of the act of parliament is, to direct that such things shall be done by the orders of the commissioners of customs, but it does not declare what the commissioners themselves shall do. It simply says, that certain persons shall have power and authority to act under the order of the commissioners, and pro-

hibits those persons from acting without such authority. So long as they have the order of the commissioners for what they do, their acts are legal. Here there has been an order of the commissioners, directing these prisoners to be taken on board a King's ship to be impressed, and I think it is no objection that the order has been signed by only four of the commissioners, it being declared by the patent that the act of any four shall be the act of the whole.

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Rule absolute (a).

(a) *Best*, J. was absent at Chambers.



The KING v. JAMES ROGERS.

Saturday,
February 9.

THE defendant had been apprehended under 1 & 2 Geo. 4. c. 118. s. 33, for having in his possession naval stores, suspected to have been stolen from a ship in the River *Thames*, and not having given any account to the satisfaction of the Justices how he became possessed of the same, was convicted under s. 40. in the penalty of 5*l.*, and in default of payment committed to the House of Correction for two calendar months.

By statute 1 & 2 Geo. 4. c. 118. s. 40, the penalties imposed by the same are directed to be distributed, one-half to the receiver therein mentioned, and the other to such persons as the convicting Justices shall direct, and it gives no appeal to the Sessions. Where a prisoner was committed under a warrant of ex-

Adolphus now moved for a writ of *habeas corpus* to bring up the body of the defendant, in order that he might be discharged, on the ground of a defect in the warrant of commitment. The statute 1 & 2 Geo. 4. c. 118. s. 40.

execution (which recited that he had been convicted) for two months, or until he paid a penalty of 5*l.* for an offence under the 33d sect. of the act, without stating how the penalty was to be distributed and to whom paid; the Court refused to discharge him out of custody for this objection, holding, that the warrant did not require the same certainty as a conviction, and that they were bound to presume there had been a legal conviction to found the warrant.

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gives the penalties recovered under the same, one half to the receiver appointed by the authority of the act, and the other to such person as the Justices shall direct, and it gives no appeal to the Sessions. Upon summary conviction to the satisfaction of the Justices, the party may be fined in the penalty of 5*l.*, and in default of payment may be committed to the House of Correction for any period not exceeding two months, unless the fine shall be sooner paid. The defendant in this instance had been convicted in the penalty of 5*l.*, and not being able to pay the same was committed for two months, but the Justice in his warrant of commitment did not state how the penalty was to be distributed, or whose hands were to receive it, which he ought to have stated, inasmuch as there was no form of conviction drawn up, and no appeal given to the Sessions, and therefore the defendant did not know to whom he was to pay the penalty, and he was left to seek the hand which was by law authorized to receive it. A warrant of commitment in such a case as this ought to contain all the certainty and formality of a conviction, because there is no other record of the proceeding, and this was the more necessary, the statute giving no appeal. In Doctor *Groenvelt's* case (*a*), it was resolved, " that the cause of commitment ought to be certain, to the end that the party may know for what he suffers, and how he may regain his liberty." Now, as the penalty is directed by the statute to be distributed in a particular manner, the commitment ought to inform the defendant how he is to regain his liberty, by pointing out to him the person to whom he is to pay the penalty. If the commitment, which is here substituted for the conviction, does not name the person who is to receive the money, to whom is he to pay the penalty and regain his liberty? As this case

(*a*) 1 *Ld. Raym.* 213.

is to be considered in the same point of view and by the same rules as a formal conviction, there are decisive cases upon the subject. In *Rex v. Seal* (a), which was a conviction on the statute 42 Geo. 3, against illegal lotteries, which act directs the penalties to be distributed one-third to the King, one-third to the informer, and one-third to the person apprehending or securing the offender; and as the conviction directed the penalty to be distributed as the law directs, without ascertaining to whom the last third was to be paid, it was held to be bad. The case of *Rex v. Helps* (b) is also an authority on this point.

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ABBOTT, C. J.—The difficulty I have in this case, is, in subjecting this warrant of commitment to the same rules of construction which are applicable to convictions. Now, the cases to which we have been referred are cases of convictions. We are bound to presume, until the contrary is shewn, that there has been a good conviction, and that the magistrate has done every thing required of him by law. This is a commitment in execution, and recites that the party had been convicted, and there is no distinction in the cases cited, which authorizes us to look at the warrant of commitment with the same strictness as a conviction. The commitment is for two months, unless the money shall be sooner paid. I think it is not necessary that the commitment should state to whom it should be paid. If the defendant pays the money to the gaoler he will be discharged forthwith. It is not suggested that the magistrate did not direct to whom the money was to be paid before the conviction took place, and as we are bound to presume that there was a good conviction before commitment, I think we ought not to discharge this defendant out of custody.

(a) 8 East, 568.

(b) 3 Maul. & Sel. 331.

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BAYLEY, J.—The defendant is committed until he shall pay the penalty. If he pays the money to the gaoler the latter is bound to discharge him out of custody, before the end of the two months, and the gaoler will afterwards take care to distribute the money properly, according to the directions of the Justice. It appears to me that there is no ground for granting this writ.

HOLROYD, J. was of the same opinion (a).

Writ refused.

(a) *Best*, J. was absent at Chambers.

Monday,
February 11.


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The Court will not direct in what manner Justices shall make their return to a *mandamus*, but if the return made to a *mandamus* be insufficient to raise the question intended to be agitated, the Court will, at the instance of the party interested, make a rule giving the Justices liberty to amend in the manner required, if they shall be so minded.

The KING v. MARRIOTT and Another, Esquires.

THIS was a rule calling upon two Justices of *Yorkshire*, to shew cause why they should not amend their return to a *mandamus* issued from this Court, commanding them to compel certain persons to perform statute duty in the township in which their lands were situated, who had claimed exemption by virtue of a local act of parliament. The Justices in their return had set forth certain clauses of the act of parliament under which the exemption was claimed, but had omitted to state a fact which the prosecutors considered material to raise the question arising upon the statute.

Coltman now shewed cause against the rule, and contended that this was an application which the Court could not entertain, because it was in effect directing the Justices in what manner they should make their return, which was contrary to all principle. The magistrates them-

selves might apply to the Court for leave to amend their return, if they had made any omission by mistake, or otherwise; but this application did not come from them, it came from the party interested in the question. The magistrates must be left to their own discretion in what manner they will make their return. The application should at least have been made with the concurrence of the magistrates, but they ought not to be compelled to shape their return in order to suit the views of an interested party.

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Scarlett, *contra*, was stopt by the Court.

Per Curiam.—We agree that we cannot oblige the Justices to make their return in a particular manner, but it is suggested that the return in its present form will not raise the question upon which the parties wish to have the opinion of the Court. The rule calls upon the Justices to shew cause why the return to the writ of *mandamus* should not be amended. It certainly cannot be made absolute in those terms, but we can vary the rule, by ordering that the Justices may be at liberty to amend the return if they should think fit, so as not to make it compulsory upon them.

Rule absolute, in the terms suggested
 by the Court.

1822.

Monday,
February 11.

The KING v. The JUSTICES of SURREY.

The stat. 12
Geo. 2. c. 28.
s.5. against de-
ceitful gaming,
requires rea-
sonable notice
of appeal to
the Sessions
against a con-
viction, but
the notice may
be by *parol*, or
in *writing*; its
reasonableness
in point of
time is for the
Justices at
Sessions to de-
termine.

THIS was a rule calling on the defendants to shew cause why a writ of *mandamus* should not issue directed to them, commanding them to cause continuances to be entered, and to hear the appeals of one *Andrew Barnett* against two several convictions by two Justices, under the statute 12 Geo. 2. c. 28. for unlawfully setting up, maintaining, and keeping a certain fraudulent game called Hazard. The rule was obtained on the ground that the Sessions had improperly refused to hear the appeals, because verbal notices only had been given of the party's intention to appeal.

Turton now shewed cause. The question in this case must turn entirely upon the construction of the fifth clause of the statute upon which the conviction was founded. That clause provides, that any person convicted under the act, shall have a power of appeal to the next General Quarter Sessions, upon giving *reasonable notice* to the prosecutor of his intention to appeal, and entering into a recognizance to try his appeal at the next Quarter Sessions, and enacts, that such appeal shall then be heard and finally determined. The language of this clause is much more comprehensive and strict than is ordinarily to be found in such statutes, and much of the argument in this case must depend upon the force and meaning to be given to the words "*reasonable notice*." The fair and just conclusion is, that the notice must be "*reasonable*" in the opinion of the Justices at Sessions, for the Justices alone are the proper judges upon such a matter. It has indeed been held, under circumstances somewhat similar to the present, that a verbal notice of

appeal is sufficient, and the case of *The King v. The Justices of Salop* (a), may be cited as decisive of that point. But upon reference to the act of parliament (b) under which the conviction in that case took place, it will be found, that the word "reasonable" does not occur, and that consequently no sort of discretion is there vested in the Justices as to what shall, or shall not, be a sufficient notice of appeal. But the mere introduction of this word in the present statute, necessarily includes and supposes a discretion in the Justices as to what is a reasonable notice, and they have determined, as they had full power to do, that a verbal notice was not a reasonable one. Upon all general principles, it is clear that the Justices in Sessions are the proper judges of what is the proper notice of appeal, and those principles have been most fully recognized in the case of *The King v. The Justices of Buckinghamshire* (c), decided in this Court, in which *Lawrence, J.*, expressly declares that the Justices at Sessions are to judge whether such reasonable notice has or has not been given, as will entitle either party to proceed upon the appeal. The Justices in the present case have acted upon these principles. They have considered themselves the sole and proper judges of what is, or is not, a reasonable notice of appeal, and, acting upon that consideration, they have concurred in the usual and ordinary practice of the Sessions, and have decided that a verbal notice is not a reasonable one. In so doing they are fully borne out by the authority referred to, and by the established practice at their own Sessions. The Justices dismissed these appeals, on the ground that there ought to have been a notice in writing, being of opinion that a verbal notice was not that *reasonable* notice required by the statute, and at the same time stating that

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(a) 4 Barn. & Ald. 626.

(c) 3 East, 342. 17 Geo. 2. c. 38.

(b) 49 Geo. 3. c. 68. s. 5.

s. 4. 3 Nolan's P. L. 417.

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they considered themselves to be the sole judges of what was reasonable notice, and the practice of their Sessions requiring a written notice, they declined hearing the appeals.

Cowley and Adolphus, contra, were stopt by the Court.

ABBOTT, C. J.—I am of opinion, that the *mandamus* in this case ought to go. Under the terms “reasonable notice,” the question, whether a parol notice of appeal is or is not sufficient, does not properly arise. Reasonable notice has no reference to the precise description of notice as respects the form, but regards rather the substance, as, whether it is reasonable in point of time or number of days before the Sessions. Unless the act of parliament specifies the form and manner in which the notice is to be given, as by directing that it shall be in writing, which some of these penal statutes do, a parol notice may clearly be given. The reasonableness of such notice, in point of time, is certainly for the Justices at Sessions to decide, and in this sense I take the words “reasonable notice” to have been used in this statute. The Sessions dismissed these appeals on the ground merely that there ought to have been a notice in writing, without regard to the reasonableness of the parol notice which is stated to have been given. It is not our province to decide upon affidavits whether reasonable notice was given in point of time. That is for the Sessions to determine; and therefore we recommend the Justices to inquire whether reasonable notice, either verbally or in writing, was given. If they shall find that reasonable notice was given, either verbally or in writing, then they will probably enter continuances, and proceed to the determination of the appeals, without making a formal return to the *mandamus*; but what we propose is not absolute upon

them, they may, if they think proper, make a return, and have the question more deliberately discussed.

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The other Judges concurred.

Rule absolute (a).

(a) Vide *Rex v. Justices of Essex*, 4 Barn. & Ald. 276.

The KING v. ELIZABETH HARPUR.

Friday,  
April 26.

THE defendant was brought up by *habeas corpus* to be discharged from a commitment by one Justice, to *Herefordshire* House of Correction, under 1 Geo. 4. c. 56, "An act for the summary punishment, in certain cases, of persons wilfully or maliciously damaging or committing trespasses on public or private property;" which enacts, "that if any person or persons *shall wilfully or maliciously do or commit* any damage to any building, &c. and be thereof convicted before any Justice, he, &c. shall forfeit and pay to the person or persons aggrieved, such a sum of money as shall appear to the Justice to be a reasonable satisfaction and compensation for the damage committed, not exceeding in any case the sum of 5*l.* which sum shall be paid, &c.; and in default of paying the same shall be committed to the common gaol or house of correction, for any time not exceeding three months, unless the same is sooner paid." The defendant had been committed under a warrant, reciting, "that one *Matthias Price* had made complaint to the Justice, that he had lost a post or pale out of his fence, and that he had cause to suspect, and did suspect, that *Elizabeth Harpur*, on

It is no offence within the statute 1 Geo. 4. c. 56, "wilfully and maliciously to carry away" a post or pale, unless the party charged has wilfully or maliciously committed the damage, injury, or spoil alleged. Therefore, where a defendant charged with cutting, spoiling, and taking and carrying away a post out of a fence, was committed for *wilfully and maliciously carrying the same away*, only: Held, that the commitment was bad, and the defendant entitled to be discharged.

Justices, under the same statute, may award satisfaction for a malicious injury to the amount of 5*l.* but in each case the extent of the injury is to be ascertained by the Justice, and compensation awarded only in proportion to the injury proved.

A commitment in execution need not recite the title of the statute on which the proceeding is founded.

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whose premises the same were found, *did cut, spoil, and take and carry away the same*; and that whereas the said *Elizabeth Harpur* did, on, &c. appear before the Justice, and not giving the Justice any satisfactory account, how she came by the post, nor producing the party of whom she bought it, nor any credible witness to testify the sale, she was, therefore, by him committed 'for wilfully and maliciously carrying away the same,' and was adjudged to pay the sum of 5*l.* and in default of payment was committed for three calendar months, there to be kept to hard labour, unless the said sum of 5*l.* was sooner paid." An affidavit was produced on behalf of the defendant, denying that she had cut or spoiled the post in question, and stating her entire innocence of the charge imputed.

*Pearson* objected, on behalf of the defendant, that there was no offence within the 1 Geo. 4, nor within any other statute, stated on the face of the commitment. The offence described in the act is the *wilfully or maliciously doing or committing any damage, injury, or spoil* to any building, fence, hedge, &c. but the defendant is committed "for wilfully and maliciously carrying away the post," which is no offence. She is charged with cutting and spoiling, but she is committed for carrying away. For any thing that appears upon the face of the commitment, some other person might have cut the post, and she might have very innocently picked it up and carried it away. Having committed no offence, she is entitled to her discharge.

When *Pearson* originally moved for the writ, he took another objection to the commitment, namely, that though it stated the offence to have been committed "contrary to a certain statute made and passed in the first year of the reign of *George the Fourth*," it did not set forth the title of the act, as he contended it should have done; because

it was impossible to know on what statute the commitment was founded, but

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ABBOTT, C.J., then said, the commitment need not mention the title of the statute.

The defendant having been brought up on a subsequent day, and the return to the *habeas corpus* read,

BAYLEY, J. (a), said—This commitment is clearly bad. The charge recited is, that the defendant had cut, spoiled, and taken away the post, and the Justice convicts her of carrying it away. It is perfectly consistent with the statement in the commitment, that somebody else may have cut and spoiled the post, and that she might have carried it away, which is no offence within this act. Therefore, as she is convicted of no offence, she must be discharged. I observe that the defendant is adjudged to pay a sum of 5*l.* It may be, that the injury done did not amount to so much. The sum to be awarded must be in proportion to the amount of the injury. Mistakes are made as to what is *damage* within the meaning of the act of parliament.

BEST, J. (b).—The magistrates think they have power to award the sum of 5*l.* at all events. That is not so. They are to ascertain what the amount of damage in each case is, and award reasonable compensation or satisfaction to the party injured, according to the amount of injury proved. They cannot go beyond the 5*l.* limited by the statute, but they are not to award 5*l.* unless damage is proved to that amount.

The defendant was ordered to be discharged forthwith.

(a) Abbott, C.J. was gone to Guildhall.

(b) Holroyd, J. was absent.

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Where the plaintiffs, who were employed as contractors, to complete a navigable canal, had erected a dam composed of piles and earth, with the owner of the soil:—Held, that they might maintain trespass against the defendants for breaking and destroying the same, and that case would not lie.


DYSON and Another v. COLLICK and Others.

**T**RESPASS for breaking and destroying a certain dam of the plaintiffs. Plea, Not Guilty, and issue joined. At the trial before *Wood*, B., at the last *Sussex Assizes*, a verdict was found for the plaintiffs, damages 156*l.* with liberty to move to enter a nonsuit, if the Court should be of opinion, that the action could not be sustained.

The case was this:—The plaintiffs were employed by the *Portsmouth and Arundel Navigation Company* as contractors, for the purpose of making a canal from the latter to the former place. In order to carry on the work, it became necessary to erect a dam on the river *Arun*. The dam was composed of piles driven into the soil, and earth, which was rammed down into the interstices. The earth had been brought from a distance, and was no part of the adjacent soil. The act of trespass complained of and proved, was in cutting through the dam by the defendants in order to let off the water, which in a wet season had accumulated and overflowed the country. The question at the trial was as to the form of the action, it being contended, that the plaintiffs could not maintain trespass, and that if they had any remedy it was in case. But the learned Judge was of opinion that trespass would lie, and the plaintiffs had a verdict.

*Taddy*, Serjt. now moved for a rule nisi to enter a nonsuit, and made two points. First, the plaintiffs have no interest in the soil to enable them to maintain trespass; and second, supposing them to have a qualified interest, the remedy is in case. As to the first, it is clear that the plaintiffs have no interest whatever in the soil where the

dam was erected. The materials of which the dam was composed were brought to the spot, and though the plaintiffs had a property in those materials, yet still it can only be considered as a personal property, severed and distinct from a property in the soil. But supposing the plaintiffs to have possession of the spot in question, still it is not such a possession as will enable them to maintain trespass, for they are mere contractors, employed by a company to perform certain work and labour, and they have no interest whatever in the soil. If trespass can be sustained, it must be at the suit of the owner of the soil, and not at the suit of the plaintiffs, who must be treated merely as servants. If the plaintiffs could be considered as 'tenants by sufferance, it is laid down in *Bac. Abr. tit. Trespass, 3. Fitzh. Tres. pl. 10*, that a tenant by sufferance cannot maintain trespass, and therefore, in that point of view, the action would not lie at the suit of the plaintiffs. But these persons have not even a possession of the soil to enable them to sue in trespass. It may be true, that the materials of which the dam was composed belong to them, but after they became connected with the soil, and as it were united to the spot on which the dam was erected, they became, for all purposes, the property of the owner of the soil, and could not be treated as the property of the plaintiffs unless they remained severed chattels. [*Bayley, J.*—Suppose, instead of earth rammed down, the dam was composed of flood-gates—whose property would they be?] The defendants are not called upon to answer that, but it may be answered by what appears certainly to be rather a subtle distinction between earth forced into the soil and a wall erected, as is taken by *Callis on Sewers*, p. 74, who makes this distinction. "A wall doth differ in point of ownership from a bank, first, in respect the material the same is made on, for a bank is made *ex solo et fundo quæ ex suis propriis materiis*

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*sunt eadem cum Terrâ supra quam edificatur*,—but so is not a wall, &c. Of a bank the property and ownership is his, whose grounds adjoin thereto.” Admitting, however, that the plaintiffs are the owners of the materials, still, as they become connected with and coalesce with the soil, the plaintiffs cease to have such a property in them as to enable them to maintain trespass. In the case of *The Duke of Newcastle v. Clark*(a), a point somewhat similar to this arose, and there it was held, that commissioners of sewers cannot maintain trespass against the commissioners of a harbour, for breaking down a wall or dam erected by the former, as such commissioners, across a navigable river, as the authority to be exercised by them on behalf of the public does not vest in them such a property or possessory interest as will enable them to maintain such an action. For these reasons it appears clear, that the plaintiffs cannot maintain trespass. Secondly, then, if they have any remedy, it is in case, for destroying the materials of which the dam is composed. They might maintain that form of action, but as they have mistaken their remedy, a nonsuit must be entered.

ABBOTT, C. J.—There is no doubt that the materials of which the dam was composed belonged to the plaintiffs. The dam is erected by them for a temporary purpose, and they have possession of the soil upon which it is erected. Their possession for the purpose of erecting the dam is such as will enable them to maintain trespass against a wrong doer. The case of *Welch v. Nash*(b) is a much stronger case than this. There, posts and rails had been put upon the land by the plaintiff against the consent of the owner of the soil, and it was held, that the defendant could not justify the act of cutting them.

(a) 2 J. B. Moore, 666.

(b) 6 East, 394.

down, no question being raised as to the property remaining in the plaintiff. In this case, the dam is erected with the consent of the owner of the land, the property of the dam is in the plaintiffs, it is erected by them at their expense, and as against a wrong doer they certainly may maintain trespass. I very much doubt whether the plaintiffs would have any remedy in case.

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BAYLEY, J.—I also doubt very much whether an action on the case could be maintained in this instance. As far as I can judge at present, I think it could not. What would be the foundation of such an action? Why, it must be, that the plaintiffs had some interest in the dam in question. What interest less than the absolute interest in the property had the plaintiffs in this dam? To maintain an action on the case, it must be shewn that the plaintiffs had something less than the absolute property. For an immediate injury to the property in possession, case is not the proper remedy, and trespass is the only remedy. In this case the plaintiffs had an interest in the dam, and it seems to me the complete and not the partial interest. They had the actual dominion over the property, exclusive of the rights of other persons. I am of opinion, therefore, that as the plaintiffs had in this instance the property in the dam necessary to maintain trespass, this rule must be refused.

HOLROYD, J.—I am of the same opinion. Trespass was the proper action for the injury complained of in this case. The plaintiffs were the owners and occupiers of the land for a special purpose, and so long as that special purpose continued, and so long as they had the possession, they had a right to maintain trespass against a wrong doer. They had both the property and the possession in

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this instance. Even in the case where a party has the possession only without the legal property, it is held, that trespass will lie. In *Welch v. Nash*, this general proposition was established, that a person who is in possession, rightfully or wrongfully, has a right to maintain an action of trespass against a mere wrong doer, and that the Court cannot enter into the question, whether the possession is rightful or wrongful. On this ground, I think, the plaintiffs are entitled to retain the verdict.

BEST, J.—In this case the owner of the land consents that the plaintiffs shall have possession of this part of the soil for the purpose of putting down certain materials to form a dam. The materials belong to the plaintiffs, and the possession is in them, and I have no doubt that they can maintain nothing but trespass for the alleged injury.

Rule refused (a).

(a) Vide *Harrison v. Parker*, 6 East, 153.

Saturday,
 May 4.

The KING v. The INHABITANTS of BRIGHT-
 HELMSTONE.

Panper took a tenement on 21st May, under a written agreement, and did not actually take possession until the 4th June, but paid rent from the

date of the agreement :—Held, that he did not come to settle until the 4th June, and, consequently, that the settlement was concluded by 59 Geo. 3. c. 50, which passed on the 2d July, although he afterwards resided more than 40 days.

BY an order of two Justices, *John York*, his wife, their three children, and a child by a former marriage, were removed from the parish of *Smarden*, in *Kent*, to the parish of *Brighthelmstone*, in *Sussex*. Upon appeal, the Sessions confirmed the order, subject to the opinion of the Court upon the following case :—

The pauper and his wife were living at *Smarden* till the 20th of *May*, 1819, on which day they set out for *Brighthelmstone*, where they arrived on the 21st of that month. Finding a house to let in that parish, which was undergoing some repair, they procured the key from the next house, to which they were referred by a bill in the window, where it was deposited for the convenience of workmen, and to enable any person who wanted the house to view it. Having seen the house, they returned the key, and the next day went to the landlord, when the following agreement in writing was entered into, and afterwards duly executed and stamped:—" *Brighton, May 21st, 1819.* Agreement made and entered into between *John Chalcroft* on the one part, and *John York* on the other part, as follows :—*John Chalcroft* doth agree with *John York* to let and hire him the house, and shop, &c. called the *Apollo Gardens*, for *25l. per annum*, with the garden ground in front as far as it belongs or extends in front of the said house. And the said *John York* to pay to the said *John Chalcroft* the rent quarterly, and to be in possession from the date hereof, *May 21, 1819.* As witness our hands, &c." As the house was undergoing repair, the key was still left at the next house. On the 21st and 22d the pauper and his wife slept at the house of a friend at *Brighthelmstone*, and on the 23d returned to *Smarden* for their children and furniture, where they remained till the 3d of *June*. On that day they again set out for *Brighthelmstone*, where they arrived on the 4th, when the key of the house was delivered to them and they went in. They lived in the house till the 27th of *November* following, when the pauper settled for the rent from the 21st of *May* with the landlord's agent, and gave up the key. The statute 59 *Geo. 3. c. 50*, entitled "An act to amend the laws respecting the settlement of the poor, so far as regards renting tenements," received the Royal As-


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sent on the 2d of *July*, 1819. The question for the opinion of the Court is, whether the pauper *John York* gained any settlement in the parish of *Brighthelmstone*, by renting the tenement in question.

Bolland, in support of the order of Sessions. At Sessions there were two questions raised in this case, first, whether the residence was sufficient, independently of the terms of the agreement, the pauper having resided forty days and more after the 4th of *June*, when his family came to *Brighthelmstone* finally; and second, whether the time of coming to settle was, or was not, to be calculated from the 21st of *May*, 1819, the day of the date of the agreement? After the case of *Rex v. St. Mary-le-bone* (a), certainly the first question is not now arguable. If, however, the pauper can be considered as having come to settle on the 21st of *May*, when he agreed for the house, there can be no doubt that he has gained a settlement, because forty-two days will then have elapsed before the passing of 59 *Geo. 3. c. 50*. Certainly if an actual residence is requisite, such a consequence will not follow. But it is not necessary that the pauper should actually reside, if it appears that he comes with an intention to settle. That he did come with such an intention is clearly manifest from the facts of the case, because the agreement is executed on the 21st of *May*, and from that time the pauper becomes liable for rent, and in fact paid rent from that day. It is enough if the pauper dwells where a part of the tenement lies, as was holden in *Rex v. Tretwell* (b). Nor need he reside upon any part of what he takes. *Rex v. Llandverras* (c). In this case there is no doubt that the pauper was the tenant of the premises from the date of the agreement, and he had a

(a) 4 Barn. & Ald. 681.

(c) Burr. S. C. 572. 2 Bott. 133.

(b) 7 T. R. 197. 2 Bott. 149.

right to remain in them if he thought proper, and the reason why he did not was, that the house was under repair. If he is virtually resident that is sufficient to satisfy the requisites of the statute, and absence for a temporary purpose will not vitiate the settlement.

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Berens, *contra*, was stopt by the Court.

ABBOTT, C.J.—It is quite manifest that the residence did not begin until the 4th of *June*, and, consequently, there cannot have been a residence of forty days. The order, therefore, must be quashed. The question arising upon the 59 *Geo.* 3, is set at rest by *The King v. St. Mary-le-bone*, decided lately by this Court, and it is unnecessary, therefore, now to consider it.

Per Curiam.

Order quashed.



THE KING *v.* WILLIAM CLARK.

Saturday,
May 4.

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INDICTMENT against the defendant for refusing to obey a warrant directed to him by county Justices for collecting and levying an assessment towards the county rate of *Somersetshire*, upon the parish of *St. James*, within the liberties of the city of *Bath*, of which parish the defendant was a constable. At the trial before *Holroyd*, J.

The proviso in 55 *Geo.* 3. c. 51. s. 1, exempting places situate within liberties or franchises having a separate jurisdiction, from contributing to the

county rate, extends only to places which have a jurisdiction separate from, and co-extensive with, the jurisdiction of the county Justices:—Therefore the city of *Bath*, in which the Justices have a separate jurisdiction for some purposes, but not for all, and who commit felons to the county gaol for trial, at the assizes, and thereby burthen the county, is not a liberty or franchise having a separate jurisdiction, and, consequently, is liable to the *Somersetshire* county rate.

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at the late *Dorsetshire* Assizes, a verdict was found for the Crown, subject to the opinion of the Court upon a special case.

The question for the opinion of the Court was, whether the city of *Bath* did or did not come within the proviso of the general county rate act, 55 Geo. 3. c. 51, as being a *liberty or franchise having a separate jurisdiction of its own*, and thereby exempting it from the payment of the general county rate of *Somersetshire*.

Adam, for the prosecution. The question in this case is, whether the city of *Bath* is, with reference to the subject-matter of this act of parliament, to be considered a liberty or franchise having a separate jurisdiction. By "separate jurisdiction" the legislature clearly mean a jurisdiction separately, distinctly, and exclusively of the county Magistrates. Unless, therefore, the city of *Bath* has an exclusive jurisdiction to that extent, the judgment in this case must be given for the Crown. It is a cardinal point in the consideration of such questions as these, that nothing but express words can oust the jurisdiction of the county Magistrates. This was said by Lord *Kenyon*, with the concurrence of the rest of the Court, in *Blankley v. Winstanley (a)*. Then, whether this be an exclusive jurisdiction, must depend upon the provisions of the charter of *Elizabeth*, granted to the city in 1590. It is true that charter contains a *ne intromittant* clause as to the jurisdiction of the county Magistrates, but the prohibition is only partial and limited. By that charter it appears, that the city Justices have only a power to try particular offences, to which alone the *ne intromittant* clause refers. The jurisdiction of the city Justices is

(a) 3 T. R. 286.

limited to trespasses, extortions, and offences of that description. They have no jurisdiction over felonies, or any other offences higher than misdemeanors, and it is to these offences only that the *ne intromittant* clause applies. Even with respect to the power of holding Quarter Sessions, that power is given only by implication. In general, where Quarter Sessions are holden in towns corporate, the charter in express terms gives the power to hold sessions and to try felonies and particular offences. *James v. Green* (a). *Weatherhead v. Drewry* (b), and *Bates v. Winstanley* (c). In all these cases there is a power expressly given to hold Quarter Sessions, and to try felonies and other offences. Now it cannot be contended, that the word "trespasses" will include felonies and other offences of that description. For this purpose, therefore, the corporation of *Bath* have not an exclusive jurisdiction. On the contrary, the practice is to commit persons charged with felony to the county gaol, and the expences incident to the trial of such offenders, and the expences of their maintenance are paid out of the county rates. A great portion of the offenders of that description who are tried at the assizes, are committed from the city of *Bath*. Can it be said then, that the magistrates of that city have a separate jurisdiction so as to exempt them from the liability to share the burthen to which their city so materially contributes?

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The Court called upon

Gaselee, for the defendant, who contended, that in order to satisfy the words of the proviso of 55 Geo. 3. c. 51, it was not necessary that the justices of *Bath* should have such an exclusive jurisdiction as that contended for on the

(a) 6 T. R. 226.

(b) 11 East, 168.

(c) 4 M. & S. 429.

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other side. It is sufficient if they have a separate jurisdiction to a certain extent, with which the county Justices cannot interfere. There may be some particular offences which the justices of *Bath* cannot try, but still that does not destroy the notion of a separate jurisdiction. There are many corporate towns, as *Derby*, *Nottingham*, and others, which have separate jurisdictions, but have not the power of trying certain offences. Here the justices have a separate jurisdiction in the preservation of the peace of the city, and they can do all that can be done *quâ* Justices of the Peace. The Justices of the Peace, *quâ* Justices, do not try murders or felonies ; it is no part of their duty to try such offences ; they can only be tried by a Court of *Oyer and Terminer*. In this case the Justices have a power to commit to the county gaol, and so far as the examination of the offenders goes, before commitment, they have an exclusive jurisdiction, but it is not necessary to the exclusiveness of their jurisdiction that they should have a power of hearing and determining. The city of *Bath* has a gaol of its own, the charter contains *non-intromittant* clauses as to the county Justices, the county Sheriff, and the Coroner, and in all respects so far as the local jurisdiction extends, it is exclusive. In the city also, rates are made similar to county rates, for the purpose of paying such expences as are incident to its local jurisdiction, in conveying prisoners to the county gaol, &c. It may be true, that the city is not liable to contribute or raise within itself a rate for all the purposes for which a county rate is raised, as, for instance, the expence of prosecuting felons, but still by the 58 *Geo. 3. c. 70*, provision is made, by which a power is given to the Justices of assize, to make an order upon the parish officers to pay the expences of the prosecutions arising within the city. Therefore for this purpose there can be no occasion for the interference of the county Justices to make a rate in

respect of such expences. But the 24th section of 55 Geo. 3. c. 51, expressly comprehends places that have commissions of the peace within themselves, and gives the Justices of such places the same powers as are given to the county Justices. The distinction here is, that the city Justices may go to the county Justices, but the latter cannot go to the former, and cannot interfere with their jurisdiction. The case of *Talbot v. Hubble* (a) shews, that where a city has Justices with an exclusive clause, the Justices of the county cannot act in matters of excise. Upon the general principle, as the city of *Bath* has a separate commission of the peace, applicable to all the ordinary business and power of a Justice, this case comes within the spirit and meaning of the proviso of the act, although there may be an apparent want of complete jurisdiction over some particular offences.

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Adam, in reply, was stopt by the Court.

ABBOTT, C. J.—I am of opinion that the city of *Bath* is liable to the county rate of *Somersetshire*. It is not necessary in this case to decide whether the rate is to be extended to all purposes for which a county rate may be made. For what particular purposes this rate is made we are not informed. If it shall turn out upon more accurate inquiry that the city of *Bath* is not liable to the expences to which this particular rate is applicable, it will be very easy to accommodate the rate so as to have it confined to the particular purpose for which the city is liable to contribute. The question depends upon the construction of the 55 Geo. 3. c. 51. By that act the county Justices are required “to assess and tax every parish, township, and other place, whether parochial or extra parochial,

(a) 2 Strange, 1154.

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within the respective limits of their commissions." It is clear, therefore, that thus far the city of *Bath* is within the limits of the commission of the county Justices. There is, however, a proviso which says, "that this act shall not extend to give any jurisdiction to the Justices of the Peace of the said several counties over any places, situate within the limits of *any liberties or franchises, having a separate jurisdiction.*" The first question therefore is, whether the city of *Bath* is a liberty or franchise, having a separate jurisdiction? That leads to the consideration of what is the meaning of "having a separate jurisdiction," according to the language of this statute.—I am of opinion that these words, "having a separate jurisdiction," mean a separate jurisdiction, co-extensive with that which the county Justices have. Now, it is quite clear that the Justices of the city of *Bath* have not a separate jurisdiction co-extensive with that of the Justices of the county of *Somerset*; for by the terms of their charter their jurisdiction, as to the punishment of offences, is confined to trespasses and other offences of that nature. Their separate jurisdiction therefore not being co-extensive with that of the county Magistrates, I am of opinion that it is not a separate jurisdiction within the meaning of this act. But, however, the act does not stop here. It would not be sufficient to say that the place was within the limits of a liberty or franchise, having a separate jurisdiction; but something else follows, which is to be connected with that, namely, that the words "liberties or franchises, having a separate jurisdiction," apply to places "which, before the passing of the act, were subject to rates in the nature of county rates, imposed and assessed by the Justices of the Peace for such liberties or franchises, or which were exempt from the rates of the county in which they lie, either in the whole or in part." Now, clearly this parish was not subject to any rate, in

the nature of a county rate, imposed or assessed by the Justices of *Bath*; nor was it exempt either in whole or in part from the county rates. I do not find any facts stated in this special case on which I can say that the city of *Bath* is exclusively exempt from the county rates. I can find nothing which authorizes me in saying that it is so exempt. Looking to the whole of this proviso, it appears to me that the city of *Bath* is not within either of the exceptions therein mentioned. Our attention is called to the 24th section, but it really does not seem to me that that section makes any difference in the case, because that section applies only to those places which are within the proviso of the first section, as it only gives the Justices of the franchise a power of making a rate within their own jurisdiction. That is really the whole effect of that clause. On the short ground that I have mentioned, I am clearly of opinion that the verdict for the Crown must stand.

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BAYLEY, J.—I am of the same opinion. A county rate is raised for many different purposes; and the object of the 55 Geo. 3. was to establish a fair and equal rate throughout the kingdom. Such a construction therefore ought to be put upon the act as will make all persons contributory to the county rate, who throw any expence upon the county. Upon this principle I think the city of *Bath* ought to contribute to the county rate, if circumstances arising within that city have the effect of exhausting a part of those funds to which the county rate is to be applied. One of the purposes to which the county rate is to be applied, is the maintenance of felons in the county gaol. It is admitted that persons who have committed felonies within the city of *Bath* are sent to the county gaol; consequently the expence of their maintenance is thrown upon the county. To remedy this inconvenience in this

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and like cases, the statute 55 *Geo. 3.* was passed. Justice requires that the expence of maintaining the felons in gaol should be borne by those who send them. The city of *Bath*, for this reason, ought to contribute to the county rate for the expence of its felons; and we ought to put such a construction upon the act as will make them liable to contribution. By the stat. 13 *Geo. 3. c. 18*, places which derive partial benefit from the county rate, are only partially liable to contribute towards it, and then the Justices are to ascertain the quantum of burthen which they are to bear. In this case the act of parliament provides generally, that there shall be a fair and equal rate; and it empowers the Justices to assess and tax every parish, township, and other place, whether parochial or extra parochial, within the respective limits of their commissions, according to a certain pound rate. The commissions of the Justices of the county of *Somerset* are *primâ facie* co-extensive with the commissions of the Justices of the city of *Bath*; and if they are excluded from the city, that exclusion applies to a limited purpose only. Their authority extends to that place, except where it is expressly excluded. There can be no doubt that with reference to felonies, committed within the city of *Bath* and its limits, the county Justices have a jurisdiction. Then there comes the proviso in the statute; and it is upon the words of that proviso that the construction is to be put, which is to say, that their jurisdiction shall not extend to places situated within the limits of liberties or franchises having a separate jurisdiction. According to that, places having a separate jurisdiction, are not to be subjected to rates, in the nature of a county rate, imposed and assessed by the Justices of the county. What is the meaning of the words "separate jurisdiction?" The fair meaning is, a separate jurisdiction, co-extensive with all the purposes for which county rates are to be applied.

As far as county rates are to be applied to the prosecution of criminals, a separate jurisdiction would have reference to such an object. But that is not the case with the city of *Bath*. The city Justices have a separate jurisdiction over offences of one description, but not of another; and therefore it seems to me, that for the expences thrown upon the county with reference to offences of the latter description, for which the charter of the city provides no jurisdiction, they are liable to contribute to the county rate. I do not think that they are at all exempted by the 58 Geo. 3. c. 70, to which reference has been made. We are to construe the 55 Geo. 3. according to the construction which ought to have been put upon it at the time that act passed, and I think the construction we are now putting upon it is most reasonable, and one which ought to have been put upon it at that time. The 58 Geo. 3. only recites, that doubts and difficulties may arise. It does not give any legislative exposition as to the construction to be put on the 55 Geo. 3; and the former would not be co-extensive with that construction which the latter requires, because the 58 Geo. 3. only provides for the expences of the prosecution of felons, but does not provide for the expence of their maintenance; so that as to that object there would be no relief against the city of *Bath*. It therefore seems to me, that the fair construction of this act of the 55 Geo. 3. is to make every place within the county, contributing to the county expence, liable to contribute to the county rate. Justices may have a separate jurisdiction as to some purposes; but if their jurisdiction does not extend to all the purposes for which the county Magistrates have jurisdiction, they must contribute their portion to the county rates.

HOLROYD, J.—I am also of opinion that the city of *Bath* is liable to contribute to the county rate. In order

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to bring it within the exemption in the proviso, it must have a separate jurisdiction. The words "having a separate jurisdiction" must mean a jurisdiction separate and co-extensive with the commissions for the county.

Postea to the prosecutors (a).

(a) *Best*, J. was absent.

Monday,  
 May 6.

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 Defendant having been convicted of forcibly passing a turnpike gate without paying toll, the Sessions, on appeal, rejected evidence to shew that the gate had been unlawfully erected, and this Court refused a *mandamus* to compel the Sessions to receive such evidence, the admissibility of it being exclusively a question for the Justices: and the Court also refused to issue a *mandamus* to the Sessions to hear an original complaint, touching the conduct of the

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**COOPER** moved for a rule to shew cause why a *mandamus* should not issue to the Justices at Sessions, commanding them to enter continuances and receive evidence in support of an appeal against the conviction of one *Benjamin Dennis*, for forcibly passing without paying toll through a turnpike gate, erected on the road leading from *Ely* to *Soham*, in the county of *Cambridge*, by virtue of a local act of parliament; and why another *mandamus* should not issue to the same Justices, commanding them to receive the complaint of the said *Benjamin Dennis*, against the trustees of the said road, for having wrongfully erected the turnpike gate in question, without any authority under the act of parliament passed for making the said road. It appeared that *Dennis* had been convicted in *December*, 1821, of forcibly passing through the gate in question, and upon appealing to the Sessions against the conviction, he offered to prove in justification of the act, that the gate had been wrongfully erected under the statute 13 Geo. 3. c. 84. s. 5, passed for making the road in question, inasmuch as the gate was erected without the

trustees in the erection of the gate after a lapse of twenty-six years, from the time when it was erected, leaving the party to proceed by indictment for the nuisance, or by an action of trespass, if his passage was obstructed.

concurrence of the requisite number of trustees therein mentioned. The 5th section of that statute required, that seven trustees of the district should concur in erecting the gate, whereas only six were parties to the act, and one of those six had been appointed to another trust, and had no authority whatever to take part in the proceeding. The Justices, however, thought such evidence inadmissible, and confirmed the conviction. The appellant then proposed to institute an original complaint against the trustees for the alleged wrongful act in erecting the gate without authority, but the act complained of having taken place twenty-six years since, the Sessions thought they had no jurisdiction, and therefore refused to hear the complaint at that time, but respited it to the last *Easter Sessions*, and then discharged it for want of jurisdiction. It was now contended, that the evidence rejected upon the appeal, was perfectly admissible upon the issue then before the Sessions, because, if the gate had been wrongfully erected, no offence was committed in passing through without paying toll, and therefore the *mandamus* ought to go to compel the Justices to receive it. As to the other application, the lateness of the complaint was no objection, because no length of time could sanction a public nuisance. In point of fact, the illegality of the act in erecting the gate had not been discovered until recently, and therefore the complainant could not be precluded by the maxim, *vigilantibus non dormientibus servit lex*. The Sessions therefore ought to have entertained this complaint.

*Per Curiam.*—There is no foundation for either of the applications made in this case. With respect to the motion for a *mandamus* to receive evidence upon the appeal, there seem to be two answers to it, first, that the Sessions are to judge what is or is not admissible evidence, generally, and we cannot interfere with their judgment

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in that respect; and second, ( which is the more substantial answer ) that we are not aware of any instance in which this Court has interfered by *mandamus* where the Sessions have heard the appeal, because they have not received *all* the evidence which the party thinks ought to have been received. The Court of Quarter Sessions are alone competent to exercise their judgment as to what witnesses are admissible, and what evidence is to be received, and if this Court were to interpose and grant a *mandamus* to them, because they have admitted an interested witness, or have rejected a witness not interested, we should be going much further than we have hitherto gone on any former occasion. In one or two instances applications of this description have been made, but the Court have said they could not properly grant a *mandamus* where the matter has been heard, and where the Justices have exercised their discretion as to the evidence received. As to the application for a *mandamus* to hear the complaint against the erection of the gate in question, as being contrary to 13 Geo. 3. c. 84. s. 5, it seems to us, that that clause does not apply to the subject, and if it did, we are of opinion, that we ought not, in the exercise of that sound discretion which influences the Court on such occasions, to grant a *mandamus* to hear a complaint in this summary way. A *mandamus* is generally granted where there is no other remedy open to the party complaining, but beyond all question there are other remedies in this instance. If the gate in question has been wrongfully erected, it is a nuisance on the highway, and may be removed as such by indictment; but the more adequate and proper mode is to bring an action of trespass if the party is forced to pay the toll, and then the validity of the proceeding in erecting the gate may be fairly brought in question. But the complaint in this case comes so very late, that on that ground alone we ought not to interfere in a summary way by *mandamus*,

and we feel the less reluctance in refusing the rule, because the party has other remedies open to him.

Rule refused (a).

(a) *Abbott*, C. J. was gone to *Guildhall*.

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The KING v. The INHABITANTS of St. AUSTELL.

Wednesday,  
May 8.

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ON appeal to the Sessions, by *Thomas Carlyon*, Esq. against a poor's rate made for the parish of *St. Austell*, in the county of *Cornwall*, in which he was assessed for the copper dues of a certain mine called *Crinnis*, situate in that parish, in the sum of 244*l.* 16*s.*, the Sessions quashed the rate, subject to the opinion of this Court, on the following case :—

*Mr. Carlyon*, at the time of making the assessment in question, and long before, was an inhabitant of the parish of *St. Blazey*, and not an inhabitant of the parish of *St. Austell*, nor the occupier of any land, house, or other property therein, unless he be deemed to be such in respect of the dues after mentioned. Being seised in fee of the lands within which the mine after mentioned is situate, *Mr. Carlyon* did, by indenture, dated 12th *January*, 1811, give and grant to *Joshua Rowe*, his partners, fellow adventurers, &c. full and free liberty, licence, &c. to dig, work, mine and search for tin, tin ore, copper, copper ore, &c. in that part of his lands called *Crinnis*, situate in the parish of *St. Austell*, and the same to take, carry away, and convert, and dispose of to his and their own use, and within the limits of the sett thereby granted, to dig and make such adits, shafts, &c. and to erect such sheds, &c. as the said adventurers should from time to

Landlord, not resident within the parish, having granted a licence for twenty-one years to certain adventurers to dig for minerals under a close, reserving to himself a certain proportion of the ore in an improved and merchantable state, and granting to the adventurers the exclusive occupation of the mine for the purpose of procuring the ores, is rateable for the relief of the poor in which the mine is situate, in respect of such reserved proportion, and in respect thereof is to be considered as an occupier of the land by the hands of the adventurers.

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time think necessary; To hold the same for the term of twenty-one years, the said adventurers yielding and paying, laying out, and delivering upon the grass unto and for the use of the said *Thomas Carlyon*, his heirs or assigns, one full eighth part or share, or dish of all tin, tin ore, &c. which should or might by virtue of the said indenture be brought to grass within the limits of the sett granted, the same having been first well and sufficiently spalled, picked, washed, &c. according to the several natures thereof, made merchantable, and fit to be smelted, and fairly divided and laid out upon the grass at the costs and charges of the said adventurers. The indenture contained covenants on the part of the adventurers to pay or deliver to the said grantor, his heirs, &c. the one-eighth part share reserved in the indenture, or to pay the value of such part or share in money, at his election, at such best price as the same could be sold for, within two months at the farthest after the minerals should be returned and sold. By other covenants four days notice was required to be given to the grantor of weighing and dividing the minerals procured; and further, that the grantee and his fellow adventurers should pay and discharge all rates, taxes, and assessments, which should be imposed during the term granted, upon the minerals, or the money arising from the sale thereof, or the dues reserved, or upon the grantor, for or in respect of the same; and that the grantees should indemnify and save him harmless from such impositions. In conclusion, the grantees covenanted during the term to work the premises granted, in the most proper and effectual manner, with a sufficient number of labouring miners, unless prevented by water or other inevitable impediment. Under this grant, and ever since the date thereof, the mine has been worked by *Mr. Rowe* and certain adventurers claiming under him, at their sole risk and expence, and without any expence, risk

or interference whatsoever, on the part of the grantor. Various shafts and other works necessary to obtain ore having been dug, and buildings erected by the adventurers, at a great expence, under and by virtue of the grant. The mine and all the erections thereon have always been, since the date of the grant, and still are, in the sole occupation and possession of the adventurers. The mine is a declining mine. The ores raised from time to time, after undergoing the process of cleansing, at an expence varying according to quality from one to fifteen shillings in the pound upon the market price, have been from time to time, before calcination and smelting, sold by the adventurers, sometimes by public, and sometimes by private contract, when they thought fit, without any control on the part of the grantor. No part of the ores raised has ever been rendered to the grantor in kind; but, in lieu thereof, one-eighth part of the money arising from the sales thereof has hitherto been paid to him in pursuance of the indenture. The grantor has heretofore been rated for the relief of the poor of the parish of *St. Austell*, in respect of the one-eighth part of the money arising as aforesaid, and has paid his assessments up to the time of the present appeal. The farm under which the mine is situated has always been occupied by a private individual, as tenant of *Mr. Carlyon*, at a yearly rent, and the tenant is rated to the poor of *St. Austell* for the same. The question for the opinion of the Court is, whether *Mr. Carlyon* is liable to contribute to the relief of the poor of *St. Austell*, in respect of the dues reserved and paid in and under the indenture mentioned. A rule nisi having been obtained for quashing the order of Sessions,

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Wilde shewed cause, and contended that the dues reserved by the indenture were not liable to be rated. He endeavoured to distinguish this case from *Rowls v.*

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*Gells (a)*, *Rex v. St. Agnes (b)*, and *Rex v. The Baptist Mill Company (c)*, and relied upon *Rex v. The Earl of Pomfret (d)*, and *Rex v. Bishop of Rochester (e)*. He dwelt upon the circumstances that in this case the appellant was not an inhabitant of *St. Austell*; that the lord had no occupation of the mine, being excluded by the terms of the grant that the adventurers had the sole occupation; that it was a failing mine; that the dues paid to the lord were in the nature of a rent, and therefore not rateable; that the surface of the soil was rated; and that the tenant actually paid the rates. This was an attempt, he contended, to rate a money rent in the hands of the lord, who did not reside in the parish, and who therefore not being an inhabitant, in any sense of the word, could only be rated, if at all, as an actual occupier of the mine. Now the occupation was negatived by the case; and therefore, independently of any other objection, the lord could not be rated. He urged the impolicy of any refined construction of the doctrine of occupation in a case of this nature, considering the anxiety of the legislature to protect property of this description, and the encouragement which ought to be extended to mining adventurers, whose interest must be materially affected by holding such property rateable.

*Adam*, contra, was stopt by the Court.

ABBOTT, C. J.—Though there may be some degree of refinement in holding that a person deriving considerable profit from land, who is not an inhabitant, is liable to pay the burthens of the parish; yet, I think, considering that the mode in which such profit is collected, tends to increase the burthens, by bringing a number of labour-

(a) Cowp. 451.

(b) 3 T. R. 480.

(c) 1 M. & S. 612.

(d) 5 M. & S. 141.

(e) 12 East, 355.

ers and artificers into the parish, there seems to be no hardship in the principle. I confess I am unable to distinguish the present case from *Rowls v. Gells* and *Rex v. The Baptist Mill Company*, and I think we ought to decide this case according to the opinion pronounced by the Court in those cases. Notwithstanding what has been urged in this case, I cannot distinguish the rate of interest which the adventurer has acquired in the mines under a grant or licence like the present, from that which he has when he works under a custom prevailing in a particular district, such as existed in those two cases. I think this case is distinguishable from *Rex v. The Earl of Pomfret* in two particulars. In that case the owner of the mines had made an absolute lease of all the mines, together with certain mills and other premises therein described; the possession therefore passed by the lease to the lessees absolutely. Whereas here the possession of the adventurer is only of that part of the mine which he has worked. The other distinction is, that in this case the reservation or render is of a part of the native minerals in a dressed state, as in the case of *Rowls v. Gells*; and not a part of a different subject, as was the case in *Rex v. The Earl of Pomfret*, where the render was not of the native mineral, but a render of something in an altered state, having first undergone the process of smelting. In these two particulars this case is distinguishable from *Rex v. The Earl of Pomfret*. Acting upon the authority of *Rowls v. Gells* and *Rex v. The Baptist Mill Company*, I think Mr. *Carlyon* is liable to be rated in respect of these dues. In so deciding this case, I feel the less reluctance; for if this be not the subject of a poor's rate, Mr. *Carlyon*, when an attempt is made to levy the rate upon him, may bring an action against the persons who enter to levy, and have the question settled in a different

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form from the present, if he is dissatisfied with this decision.

BAYLEY, J.—We ought to lay out of the question the fact, that in this particular case the mine is a failing mine; for, whether failing or not, the property, which is the subject of the present rate, is a beneficial and useful property to the person upon whom the rate is made. In *Rex v. Parrott(a)*, which was the case of a coal-mine, it was decided, that whether the mine was thriving or not, if it were the subject of a rate, it must still be rated. But the short ground upon which my opinion is founded, is, that this comes within the principle laid down in *Rowls v. Gells*, *Rex v. The Baptist Mill Company*, and *Rex v. St. Agnes*, and is distinguishable from *Rex v. The Earl of Pomfret*, and *Rex v. The Bishop of Rochester*. In the former cases the Court acted upon the principle, that the persons on whom the rate was to be imposed, were to be considered as the occupiers of the land; and, in respect of the occupation of the land, had derived a beneficial profit; but, in the latter cases, the Court came to a different conclusion, because the party had completely divested himself of the possession; and therefore he ought not to be held rateable. Here the party has not divested himself of the possession. The case of *Rowls v. Gells* first decided that the person first entitled to the lead was liable to be rated; and the only way in which it is attempted to distinguish that case from this, is, that there the person first taking the lead, was the assignee of the lord of the manor, and not himself. That makes no distinction; for if the lord would not be liable, the assignee would not be liable. The only way of making him rateable is by considering him to a certain extent as the occupier of the land. That case was followed by *Rex v.*

(a) 5 T. R. 596.

St. Agnes, and Rex v. The Baptist Mill Company. When those cases came before the Court, they were fully considered with reference to the language of the stat. 43 *Eliz.* c. 2. The Court were anxious to see whether each particular case fell within the words of that act. Then upon what principle was it that they laid down the rule, that the lord who receives an aliquot part of the produce of the mine, is rateable? Why it was upon this, that the lord must be considered as occupying the land by the hands of the adventurers; and that it was possessed by him when he had his share of the produce, after satisfying the adventurers for their labour and risk; and that though the adventurers were to work and to have the sole and exclusive privilege of working, yet as they were to work and raise for his benefit part of the produce of the mine, he was, by their hands and by their labour, to a certain extent a joint occupier of the land. That was the principle upon which those decisions were founded. I agree that the reason given for such a decision is to a certain degree refined; but that was the reason. Such was the principle of *Rowls v. Gells*, and the other cases mentioned. But when the cases of *Rex v. The Bishop of Rochester* and *Rex v. The Earl of Pomfret* came before the Court, they said that those cases were distinguishable, because there the lord had entirely let the mines; and whether they were worked or not, still he was out of possession, and therefore could not be considered as the occupier, and the working by the adventurers was not a working for him and them jointly, but exclusively for themselves. Whether they worked or not, the legal possession was in the miners. In the latter case the miners paid a money rent, and therefore the relation of landlord and tenant subsisted between the parties to all intents and purposes. In the present case there is this difference, that the adventurers entitled under this instrument have not the

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entire occupation. They have the exclusive right of working the mine; but that does not give them the entire and exclusive occupation. Upon the grounds, therefore, that this instrument does not profess to convey the minerals until they are worked; that it does not contain proper words of demise, but merely grants these persons, at most, the privilege of digging and sinking adits, not for their sole benefit, but upon the terms that they shall leave upon the grass, for the benefit of the lord, a portion, in a certain improved state, of what they shall get from the mine, it seems to me that the case ranges itself within the principle established by *Rowls v. Gells*, and *Rex v. The Baptist Mill Company*; and that Mr. Carlyon must, by the hands of these adventurers, be considered to a certain extent as the occupier of the land; and if so, he is clearly rateable.

HOLROYD, J. (who had only heard part of the argument) said,—That as far as he had heard the case, it clearly fell within the range of *Rowls v. Gells*, and the cases subsequently decided, following up the principle there laid down.

BEST, J. concurred with the rest of the Court.

Order of Sessions quashed.

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The KING v. The INHABITANTS of WHITEHAVEN.


Saturday,
May 6.

BY an order of two Justices, *Mary M'Cornick* was removed from the township of *Whitehaven* to the township of *Workington*, both in the county of *Cumberland*. Upon appeal the Sessions quashed the order, subject to the opinion of the Court upon the following case:—

The pauper, *Mary M'Cornick*, an unmarried woman, with child, and thereby chargeable, but who had not applied for, or received parochial relief, was removed from *Whitehaven* to *Workington*, the place of her birth settlement. The pauper, at the time of her removal, was above the age of twenty-one, had gained no settlement for herself, was unemancipated, and was living with her father and mother, as part of their family. The father and mother were both *Irish*, and had gained no settlement in *England*. The father had not applied for, or received any relief from the removing township for himself, or for any part of his family. The father was not examined before the removing Magistrates. The question for the opinion of the Court is, whether, under the provisions of the 59 *Geo. 3. c. 12*, and the above circumstances, the pauper was properly removed to the place of her birth settlement?

The daughter of *Irish* parents, pregnant of a child likely to be born a bastard, and therefore actually chargeable by 35 *Geo. 3. c. 101. s. 6*. may be removed to her birth settlement in *England*, though unemancipated; and the head of the family does not through her become chargeable by force of 59 *Geo. 3. c. 12. s. 33*, so as to render the whole family removeable to *Ireland*.

F. Pollock and *Armstrong*, in support of the order of Sessions. The question in this case is, whether an unmarried woman, above the age of twenty-one, unemancipated, happening to be born in this country, her parents being *Irish*, can, by reason of her pregnancy (whereby she herself becomes chargeable), in construction of law, render her parents chargeable, and thereby make it im-

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perative upon the Justices to remove the whole family to *Ireland* by force of the statute 59 Geo. 3. c. 12? The order of removal is bad on two grounds; first, the Justices have not examined the pauper's father, which they are required to do by 59 Geo. 3. c. 12. s. 33; and, second, they should have removed the pauper and the whole of her family to *Ireland*, they having become chargeable through her means, she being unemancipated, pregnant of a child likely to be born a bastard, and having no birth settlement in this country. As to the first point, the words of the 33d section of the statute are imperative. It declares, that "it shall be lawful, and the Justices are hereby required" to examine the father; and *Bayley, J.* in *Rex v. Leeds (a)* says, "these are words of compulsion on the Magistrates." By omitting such examination therefore, and only examining the mother as to the birth, the removing Justices have arrived at a wrong conclusion, and contrary to the statute. For this there is no express authority; but the objection is analogous to the cases where the Justices do not take the examinations touching the pauper's settlement, or do not join in the adjudication as to the settlement. Then, secondly, under this statute the Justices have no discretion to exercise; for if a case comes before them where the member of a family, the head of which has no legal settlement, but is a native of *Scotland* or of *Ireland*, becomes chargeable, and he or she is unemancipated, it is incumbent on the Justices to examine the head of the family, and send him, together with his family, to *Scotland* or *Ireland*, as the case may be. [*Bayley, J.*—That is, provided the individual, who becomes chargeable, has a right to look to the parent for support at that time.] When a young woman remains unemancipated, and a part of her father's family, she is entitled to look to him for

(a) 4 Barn. & Ald. 501.

support; and if she becomes chargeable, then the head of the family becomes chargeable within the meaning of this act, which declares "that if any person born in *Ireland* becomes chargeable, by himself, or his family," he shall be removed. It is stated in the case certainly that the pauper had not actually received relief; and the words in the act are "actually chargeable:" but still by the 55 Geo. 3. c. 101. s. 6. it is provided that every unmarried young woman, pregnant of a child likely to be born a bastard, shall be "deemed and taken to be a person actually chargeable." It follows from this, that if the head of a family, who is born in *Ireland*, becomes chargeable by one of his children, he comes within the meaning of 59 Geo. 3. and the whole family may be removed to *Ireland*. *The King v. Leeds* is an express authority to shew that in all cases where an *Irishman* or his family are become chargeable, or constructively chargeable, as is contended in this case, the whole family are to be removed. Here the head of the family has become chargeable through his daughter, and as she has gained no legal settlement in this country, the whole family is to be removed. The object of the act was to prevent an inconvenience which had become prevalent, namely, that of an *Irish* family coming over into this country for an occasional purpose, and having children born in this country, entailing burthens upon the parishes through which they happened to pass. This is a case of that description. The father of the pauper, passing through *Whitehaven* twenty years since, happened to have an increase in his progeny, and now, at a distance of twenty years, the inhabitants of *Whitehaven* are called upon to maintain the additional member of the family. As the act evidently intended to subject the natives of *Scotland* and *Ireland*, coming to this country, to the liability of being sent back to their native country, if they became chargeable in *Eng-*

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*land*, either by themselves, or by any member or members of their family, this case falls within the policy as well as the letter of the act, and therefore the order of Sessions was right. This is not like the case of *Rex v. Great Clacton* (a), because there the pauper's father being dead, and his mother having gained a settlement in this country by marrying a second husband, the pauper was to be considered as having no parent alive, and therefore not within 59 Geo. 3. c. 12. There is no doubt upon the construction of the statute 35 Geo. 3. c. 101. s. 6, as to the chargeability of the pauper; and the cases of *Rex v. Alveley* (b), and *Rex v. Tibbenham* (c), are authorities upon the construction of that act to shew that an unmarried woman, pregnant of a child likely to be born a bastard, is actually chargeable.

*Scarlett*, contra, said, the whole argument in this case turned upon what was supposed to be the meaning of this act of parliament. The fallacy here was, in applying a constructive chargeability of a single individual to the whole family. The evident intention of the statute was to make the whole family removable only when the whole became chargeable, and where the parent was not of ability to maintain his children. Now for any thing that appeared here, the parent was in a condition to maintain the pauper, and it would be a most violent and cruel construction of the statute to make the whole family removable to *Ireland* under this statute, because, by another act of parliament quite foreign to this, a young woman unmarried, and with child, was declared to be actually chargeable.

ABBOTT, C. J.—I really do not know how to say that the father of the pauper becomes chargeable by a part of

(a) 3 Barn. & Ald. 410. (b) 3 East, 563. (c) 9 East, 388.

his family, because this young woman being above the age of twenty-one, is by construction of law liable to be removed as a person chargeable. She is made chargeable by the provisions of a particular statute. The object of the legislature in treating a young woman unmarried and pregnant, as chargeable, is, to prevent the consequences of entailing a burthen on the parish in which she happens to be. I take it, that the meaning of the statute 59 Geo. 3. is, that the whole family shall be removed if the head of the family is not of ability to maintain his children, and that they are not to be removed absolutely without any regard to that circumstance.

BAYLEY, J. and HOLROYD, J. concurred (a).

Order affirmed.

(a) *Best*, J. was absent.

JONES v. WOOLLAMS.

**D**ECLARATION on bond. Defendant craved oyer, and set out the bond, which appeared to have been given by the defendant to the plaintiff, as *Treasurer of a Friendly Society*, and upon, for, and in respect of no other cause or consideration whatever, as the plea averred; and defendant then pleaded, that "the rules, orders, and regulations, under which the said Society is governed, have not, nor hath any or either of them, according to the form of the statute in such case made and provided, been exhibited, confirmed, or filed at any General Quarter Sessions of the Peace, or at any adjournment thereof, holden in and for the said county, riding, division, or shire, where the said Society hath been or was established, as by law they ought to have been, which he is

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A bond given to the Treasurer of a *Benefit Society* for the use of the Society, is an available security at common law, though the rules and regulations of the Society have not been exhibited, confirmed, and filed at the Quarter Sessions, in pursuance of stat. 33 Geo. 3. c. 54. s. 2.

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ready to verify, wherefore," &c. Demurrer to the plea and joinder in demurrer.

*Storks*, for the plaintiff, was stopt by the Court.

*Barnewall*, contra, contended, that as by the statute 33 Geo. 3. c. 54. s. 2. the rules and regulations of a Benefit Society are required to be exhibited, confirmed, and filed at the Quarter Sessions of the Peace for the county, riding, division, or shire, where the Society is established, it was necessary, in order to give validity to the bond in the hands of the plaintiff, who was the treasurer of a Benefit Society, for whose use it was given, that the requisites of the statute should have been complied with. They had not been complied with, and therefore the bond was void.

*Per Curiam*.—If there was any thing in the act of 33 Geo. 33. c. 54. which expressly declared that such an instrument as this should become void, if the rules and regulations of the Society had not been exhibited, confirmed, and filed at the Quarter Sessions, undoubtedly we should give effect to such a provision. But if there is nothing in the act which makes it void, we see no reason why this should not be a good bond at common law. It may be true that the Society may not be entitled to the benefit of the provisions of the act of parliament, if they do not comply with the requisitions of the 2d section; but still that will not make the instrument void, unless it is so declared by the statute. There is no prohibition in the act; and as this appears to be a very good bond at common law,

Judgment must be given for the plaintiff  
on demurrer.

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The KING v. The INHABITANTS of BARLESTONE.

**BY** order of two Justices, *Samuel Blorley*, his wife, and one child, were removed from the parish of *Heather*, in the county of *Leicester*, to the parish of *Barlestone*, in the same county. On appeal, the Sessions confirmed the order, subject to the opinion of the Court on the following case:—The respondents proved an apprenticeship of the pauper to one *John Greasley*, in the appellant parish, and a residence of forty days. The appellants, in order to shew a subsequent settlement, produced a paper purporting to be an assignment of the pauper by *Greasley* to one *Thomas Dalby*, in the parish of *St. Mary, Leicester*, and proved a residence of forty days there under that assignment. *Greasley* paid *Dalby* 5*l.* at the time of the assignment, and he had received the same sum from the parish of *Heather* at the time of the original binding. The assignment was executed by *Greasley*, *Dalby*, and the pauper, and was attested by two subscribing witnesses. The question for the opinion of the Court is, whether, upon the true construction of the statutes 33 Geo. 3. c. 57, and 56 Geo. 3. c. 139, the pauper gained a settlement by his service under the assignment.

A parish apprentice assigned (before the passing of 56 Geo. 3. c. 139.) by an old to a new master by consent in writing, but without the consent of two Justices, as required by 32 Geo. 3. c. 57, gains a settlement by service with the second master under the contract with the original master.

*S. M. Phillips* and *Dwarris*, in support of the order of Sessions, contended, that the assignment in question not having been made with the consent of two Justices in writing, as required by 32 Geo. 3. c. 57. s. 7, was not an instrument under which a settlement could be gained. That branch of the statute, after reciting that persons were frequently compellable to take a greater number of



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parish apprentices than they could maintain or employ, and were therefore forced to place out or assign them to others; and that it was proper that such assignments should be legally made under the inspection and control of the Magistrates, as well for the benefit of the apprentice, as that the original master might be discharged from his covenants, and that it was fit that the person to whom any such assignment should be made, and also that the apprentice should be subject to the ordinary jurisdiction of Justices of the Peace, with respect to masters and parish apprentices, requires the assignment of the apprentice to be in writing, in the form, or to the effect there mentioned, with the assent of two Justices under their hands. From this it is evident that the legislature meant to exclude any other manner of assigning an apprentice. Then the 9th section declares, that the before mentioned provisions of the act shall not extend to any case of binding where a larger sum than 5*l.* shall be given. It is manifest therefore that the requisition as to the assignment, with the consent of two Justices, is compulsory with respect to all apprenticeships, where the sum given is under 5*l.* Then follows the 56 *Geo. 3. c. 139*, which completely removes any doubt which might exist upon this question. That act passed for the purpose of amending the laws previously in force respecting parish apprentices; and by the 9th section it is enacted, "that it shall not be lawful for any master or mistress to put away or transfer to any other, or in any way to discharge or dismiss from his or her service any parish apprentice, without such consent of such Justices," as is directed in 32 *Geo. 3. c. 57*; and "that no settlement shall be gained by any service of such apprentice after such putting away or transfer, *unless such service shall have been performed under the sanction of such consent as aforesaid.*" Upon the construction of both these statutes, it is quite evident

that this assignment is invalid, and that no settlement can be gained by any service under it. The only argument which can be offered on the other side, is, that this assignment took place prior to the last mentioned statute; and that the 32 Geo. 3. c. 57 does not, by force of sec. 9, extend to the case where a larger sum than 5*l.* shall have been given as an apprentice fee. But, referring to the language of both statutes, these objections are not available.

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*G. Marriott* and *Simons*, contra, made two points. First, that the language of the statute 32 Geo. 3. c. 57. s. 7, will not bear such a construction as is contended for on the other side, inasmuch as it evidently extends only to such apprentices as might have been *forced* upon their masters under the 9 & 10 W. 3. c. 11; and, second, that though the assignment in question be not strictly valid as an assignment within the meaning of the statute, yet it is at all events an instrument sufficiently expressive of the original master's consent to a *service* with another master, to enable the apprentices by such service, with such consent, to gain a settlement. As to the first objection, the 7th section of 32 Geo. 3. c. 57, after reciting, "that it frequently happens that persons are *compellable*, under the 9 & 10 W. 3. to take a greater number of parish apprentices, &c. and are therefore *forced* to place out or assign over such apprentices, &c." goes on to make the provisions therein mentioned as to the assignment. It is clear, therefore, upon the face of this recital, that the section applies only to the cases where the master is *compelled* and *forced* to make the assignment, and cannot apply to the case where there is a voluntary transfer by the first master to the second. The statute does not apply where both masters mutually consent to the assignment, and consequently the settlement in this case is legally gained under the assign-

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his family, because this young woman being above the age of twenty-one, is by construction of law liable to be removed as a person chargeable. She is made chargeable by the provisions of a particular statute. The object of the legislature in treating a young woman unmarried and pregnant, as chargeable, is, to prevent the consequences of entailing a burthen on the parish in which she happens to be. I take it, that the meaning of the statute 59 Geo. 3. is, that the whole family shall be removed if the head of the family is not of ability to maintain his children, and that they are not to be removed absolutely without any regard to that circumstance.

BAYLEY, J. and HOLROYD, J. concurred (a).

Order affirmed.

(a) *Best*, J. was absent.

### JONES v. WOOLLAMS.

Tuesday,  
May 14.

**D**ECLARATION on bond. Defendant craved oyer, and set out the bond, which appeared to have been given by the defendant to the plaintiff, as *Treasurer of a Friendly Society*, and upon, for, and in respect of no other cause or consideration whatever, as the plea averred; and defendant then pleaded, that "the rules, orders, and regulations, under which the said Society is governed, have not, nor hath any or either of them, according to the form of the statute in such case made and provided, been exhibited, confirmed, or filed at any General Quarter Sessions of the Peace, or at any adjournment thereof, holden in and for the said county, riding, division, or shire, where the said Society hath been or was established, as by law they ought to have been, which he is

A bond given to the Treasurer of a *Benefit Society* for the use of the Society, is an available security at common law, though the rules and regulations of the Society have not been exhibited, confirmed, and filed at the Quarter Sessions, in pursuance of stat. 33 Geo. 3. c. 54. s. 2.

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ready to verify, wherefore," &c. Demurrer to the plea and joinder in demurrer.

*Storks*, for the plaintiff, was stopt by the Court.

*Barnewall*, contra, contended, that as by the statute 33 Geo. 3. c. 54. s. 2. the rules and regulations of a Benefit Society are required to be exhibited, confirmed, and filed at the Quarter Sessions of the Peace for the county, riding, division, or shire, where the Society is established, it was necessary, in order to give validity to the bond in the hands of the plaintiff, who was the treasurer of a Benefit Society, for whose use it was given, that the requisites of the statute should have been complied with. They had not been complied with, and therefore the bond was void.

*Per Curiam*.—If there was any thing in the act of 33 Geo. 33. c. 54. which expressly declared that such an instrument as this should become void, if the rules and regulations of the Society had not been exhibited, confirmed, and filed at the Quarter Sessions, undoubtedly we should give effect to such a provision. But if there is nothing in the act which makes it void, we see no reason why this should not be a good bond at common law. It may be true that the Society may not be entitled to the benefit of the provisions of the act of parliament, if they do not comply with the requisitions of the 2d section; but still that will not make the instrument void, unless it is so declared by the statute. There is no prohibition in the act; and as this appears to be a very good bond at common law,

Judgment must be given for the plaintiff.  
on demurrer.

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**BY** order of two Justices, *Samuel Bloxley*, his wife, and one child, were removed from the parish of *Heather*, in the county of *Leicester*, to the parish of *Barlestone*, in the same county. On appeal, the Sessions confirmed the order, subject to the opinion of the Court on the following case:—The respondents proved an apprenticeship of the pauper to one *John Greasley*, in the appellant parish, and a residence of forty days. The appellants, in order to shew a subsequent settlement, produced a paper purporting to be an assignment of the pauper by *Greasley* to one *Thomas Dalby*, in the parish of *St. Mary, Leicester*, and proved a residence of forty days there under that assignment. *Greasley* paid *Dalby* 5*l.* at the time of the assignment, and he had received the same sum from the parish of *Heather* at the time of the original binding. The assignment was executed by *Greasley*, *Dalby*, and the pauper, and was attested by two subscribing witnesses. The question for the opinion of the Court is, whether, upon the true construction of the statutes 33 Geo. 3. c. 57, and 56 Geo. 3. c. 139, the pauper gained a settlement by his service under the assignment.

A parish apprentice assigned (before the passing of 56 Geo. 3. c. 139.) by an old to a new master by consent in writing, but without the consent of two Justices, as required by 32 Geo. 3. c. 57, gains a settlement by service with the second master under the contract with the original master.

*S. M. Phillips* and *Dwarris*, in support of the order of Sessions, contended, that the assignment in question not having been made with the consent of two Justices in writing, as required by 32 Geo. 3. c. 57. s. 7, was not an instrument under which a settlement could be gained. That branch of the statute, after reciting that persons were frequently compellable to take a greater number of

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parish apprentices than they could maintain or employ, and were therefore forced to place out or assign them to others; and that it was proper that such assignments should be legally made under the inspection and control of the Magistrates, as well for the benefit of the apprentice, as that the original master might be discharged from his covenants, and that it was fit that the person to whom any such assignment should be made, and also that the apprentice should be subject to the ordinary jurisdiction of Justices of the Peace, with respect to masters and parish apprentices, requires the assignment of the apprentice to be in writing, in the form, or to the effect there mentioned, with the assent of two Justices under their hands. From this it is evident that the legislature meant to exclude any other manner of assigning an apprentice. Then the 9th section declares, that the before mentioned provisions of the act shall not extend to any case of binding where a larger sum than 5*l.* shall be given. It is manifest therefore that the requisition as to the assignment, with the consent of two Justices, is compulsory with respect to all apprenticeships, where the sum given is under 5*l.* Then follows the 56 Geo. 3. c. 139, which completely removes any doubt which might exist upon this question. That act passed for the purpose of amending the laws previously in force respecting parish apprentices; and by the 9th section it is enacted, "that it shall not be lawful for any master or mistress to put away or transfer to any other, or in any way to discharge or dismiss from his or her service any parish apprentice, without such consent of such Justices," as is directed in 32 Geo. 3. c. 57; and "that no settlement shall be gained by any service of such apprentice after such putting away or transfer, *unless such service shall have been performed under the sanction of such consent as aforesaid.*" Upon the construction of both these statutes, it is quite evident

that this assignment is invalid, and that no settlement can be gained by any service under it. The only argument which can be offered on the other side, is, that this assignment took place prior to the last mentioned statute; and that the 32 Geo. 3. c. 57 does not, by force of sec. 9, extend to the case where a larger sum than 5*l.* shall have been given as an apprentice fee. But, referring to the language of both statutes, these objections are not available.

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*G. Marriott* and *Simons*, contra, made two points. First, that the language of the statute 32 Geo. 3. c. 57. s. 7, will not bear such a construction as is contended for on the other side, inasmuch as it evidently extends only to such apprentices as might have been *forced* upon their masters under the 9 & 10 W. 3. c. 11; and, second, that though the assignment in question be not strictly valid as an assignment within the meaning of the statute, yet it is at all events an instrument sufficiently expressive of the original master's consent to a *service* with another master, to enable the apprentices by such service, with such consent, to gain a settlement. As to the first objection, the 7th section of 32 Geo. 3. c. 57, after reciting, "that it frequently happens that persons are *compellable*, under the 9 & 10 W. 3. to take a greater number of parish apprentices, &c. and are therefore *forced* to place out or assign over such apprentices, &c." goes on to make the provisions therein mentioned as to the assignment. It is clear, therefore, upon the face of this recital, that the section applies only to the cases where the master is *compelled* and *forced* to make the assignment, and cannot apply to the case where there is a voluntary transfer by the first master to the second. The statute does not apply where both masters mutually consent to the assignment, and consequently the settlement in this case is legally gained under the assign-



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ment. Then, as to the second point, it is notoriously every day's practice that assignments of parish apprentices are made by parol, and settlements are gained under them, even without the consent of Justices, as required by 32 Geo. 3. Until the passing of the last parish apprentice act, such parol assignments were never questioned, even in settlement cases which have been brought before this Court, in which apprenticeships have been in dispute. It is true that the question of an assignment *in writing*, without the consent of Justices, has never come before the Court; but if the validity of a parol assignment has never been questioned, *à fortiori* an assignment in writing does not require such consent, or at least it is a valid expression of the master's consent to another service, which is all that is required for the purpose of conferring a settlement. The 56 Geo. 3. c. 139. having been passed subsequently to this assignment, cannot be called in aid of the argument on the other side; but supposing it enters into the question, it clearly implies that the 32 Geo. 3. with regard to assignments, was not then supposed to affect the gaining of settlements, as it did not make it compulsory upon the masters to obtain the consent of the Justices; and indeed that latter statute is evidently referred to in the 56 Geo. 3, as one which did not come up to the provisions therein made, for otherwise there could have been no occasion for the clause relating to assignments, and the law might have been left as it stood. Therefore, as the assignment in question was made before the passing of the late statute, it is clear that a settlement was gained under it. They referred to *Rex v. St. George, Hanover Square* (a), *Rex v. Tavistock* (b), *Rex v. Clapham* (c), *Rex v. St. Petrox* (d), *Castor v. Aicles* (e), *Rex*

(a) Burr. S. C. 12.

(d) Burr. S. C. 248.

(b) Ibid. 578.

(e) 1 Salk. 68. and 1 Lord Raym. 683.

(c) Ibid. 266.

*v. Christowe (a)*, and *Rex v. East Bridgeford (b)*, as deciding that service under the second master, with consent of the old master, would confer a settlement, although there was no compliance with the provisions of 32 Geo. 3. c. 57.

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*The Court* took time to consider of the case, and on this day

ABBOTT, C. J. delivered the judgment:—We have considered of this case, and are of opinion that the pauper gained a settlement in the parish of *St. Mary*, in the borough of *Leicester*, and therefore the rule for quashing the order of Sessions must be made absolute. It appears that the assignment of the apprentice to the new master took place before the statute of the 56 Geo. 3. c. 139, and therefore it is not affected by that statute. The former statute of the 32 Geo. 3. c. 57. is not a prohibitory but a remedial statute. Before that statute, the master could not discharge himself from the obligation of maintaining the apprentice by assigning him to another master; nor was the apprentice in any manner whatever subject to the order or control of the Magistrates. This act however contained a clause, declaring, that if certain terms therein expressed were complied with, this inconvenience should be remedied; but if not complied with, as in this case they were not, then such cases were not to be within that statute. We ought therefore to consider this case as it would stand before the 32 Geo. 3. had passed, and to treat it as a settlement gained under the first master; for though the assignment may be for many purposes inoperative as against the second master, yet, in construction of law, it renders the service to the second master a service under the original contract with the first. Then

(a) 11 East, 95.

(b) Burr. S. C. 133.

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the cases of *Rex v. East Bridgeford* (a), and *Rex v. St. Petrox* (b), are in point. In the first of those cases the widow of the first master, who had not taken out letters of administration, had consented by parol to the assignment to the second master, and it was held that the apprentice gained a settlement in the parish in which he had served the second master. In the last of those cases the service under the original hiring was held sufficient to gain a settlement in another parish, by reason of the assignment, although fresh indentures had been entered into between the apprentice and the new master; the first indenture being only voidable. These cases, and some others, determined upon the same principle, appear to have been considered and confirmed in *Rex v. Christowæ* (c). All these cases establish this principle, that where the apprentice is assigned in fact, although without proper authority, yet he gains a settlement by serving the master to whom he is so assigned, as serving him by the consent of the original master. In the case of *Rex v. Christowæ* the apprentice was bound by the original master to another master by a new indenture of apprenticeship, without reference to or recognition of the original indenture, which still subsisted in law; but the Court, on that ground, held, that the service to the second master could not be considered as a service under the original binding, because that was only evidence of the first master's consent to the service with the second under a new and distinct contract of apprenticeship, and consequently that a settlement was not gained by such a service. For the reasons we have given, we are of opinion that a settlement was gained by the service under this assignment.

Order of Sessions quashed.

(a) Burr. S. C. 133.

(b) Ibid. 248.

(c) 11 East, 95.

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## The KING v. The INHABITANTS of OAKMERE.

**BY** an order of two Justices, *John Bradford* was removed from the township of *Over Tabley* to the township of *Oakmere*, both in the county of *Chester*. On appeal, the Sessions confirmed the order, subject to the opinion of the Court upon the following case:—The township of *Oakmere*, until the passing of a local and personal act of the 52 Geo. 3, was part of the forest of *Delamere*, in the county of *Chester*, and an extra-parochial place. Under and by virtue of the said act, passed for inclosing the forest of *Delamere*, the forest was duly divided in the month of *December*, 1819, into four separate townships, of which *Oakmere* is one, and since that time overseers of the poor have been duly appointed for the said township of *Oakmere*. The pauper was born a bastard in *Oakmere* while it was an extra-parochial place and part of the forest of *Delamere*, and before the division into townships took place. The question for the opinion of the Court is, whether the order of removal to *Oakmere*, as the birth-place of the pauper, can be sustained?

An extra-parochial district having been erected by a local act of parliament into a new township, and it was declared that it should from thenceforth provide for its own poor, and be subject to the same regulations as were incident to other townships in the same county: Held, that a pauper bastard born within the district before it was erected into a township, was not removeable to the new township as the place of his birth settlement.

*Nolan*, in support of the order of Sessions, contended, that after the passing of the 52 Geo. 3, for inclosing the forest of *Delamere*, under which the townships were created, the pauper was removeable to that township in which he was born. It must be admitted that this was not a township until after the passing of the act, though that fact is not distinctly stated in the case. By that act the district called *Delamere* forest, and certain extra-parochial land contiguous to it, was erected into a parish, and authority is thereby given to the commissioners to divide the parish into two or more townships, and it is then declared, "that when the same shall be so divided, each

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and every such township shall from thenceforth for ever thereafter provide for its own poor." After this division had taken place therefore, it is clear that each township was liable to maintain the bastards born within its boundary, previous to being separated from the other parts of the parish. It is obvious that the effect of this clause is to extend the benefit of the statutes relating to the poor to the townships instead of the parish, and to prevent the agitation of the very question now raised on the other side. It will be argued, that as this was not a township or vill before the passing of this act, no effect can be given to its operations, unless it can be construed retrospectively. Now, looking to the language of the section by which the townships are erected, such a construction must be given to it, because it declares, "that every such township shall, from thenceforth for ever thereafter, provide for its own poor." It cannot be disputed that this pauper is one of the poor of *Oakmere*; and if so, surely after it has been made a township, all the consequences of the division must follow, one of which is, that each township shall support its own poor. The object of this clause clearly was to put this township, when erected, into precisely the same situation as any other township in the county of *Chester*, or kingdom of *England*, which, at the time the act passed, was liable to maintain its own poor. Then, as all other townships were liable to maintain bastards born within their precincts, by force of the statute 13 & 14 *Car. 2. c. 12. s. 21*, so this act having the effect of putting the inhabitants in the same situation as they would be in if it had been an ancient township or vill, they are liable to maintain this pauper who was born in their township.

J. Williams, contra, contended, first, that the statute 13 & 14 *Car. 2. c. 12. s. 21*, would have no operation upon any extra-parochial place, unless it had the reputa-

tion of a vill or township; and second, that the statute in question having obviously a prospective and not a retrospective operation, could not affect the settlement of this pauper so as to make him removeable to the newly-erected township. As to the first point, it seemed, indeed, to be conceded, that the statute of 13 & 14 *Car. 2.* could only apply to a place having the reputation of a vill. It is admitted, that this place was not a vill or township until the passing of this act, and, therefore, the case must fall within the operation of the statute of *Charles*, which authorises the removal of bastard paupers to the place of their last legal settlement. When the pauper was born there was no such place as the township of *Oakmere*, and, therefore, he must be removed to the parish to which he would have been removeable if that township had never been erected. It would be a strange proposition to contend, that an extra-parochial place, erected into a township forty years after the birth of a pauper, should be obliged to maintain that person as one of its own poor. The words "its own poor," must mean the poor who should have occasion for relief after the passing of the act, and cannot mean the poor who were in existence before the township was created. To sanction the argument on the other side would be productive of the greatest inconvenience, because it might then be competent for parishes, in which paupers are legally settled, to relieve themselves from the burthen of their maintenance, by removing them to the new townships, because they happened to have been born within the district of which those new townships consisted. But, in the second place, this question is completely decided by the language of the statute itself, and cannot admit of any argument, because it is clearly prospective; and cannot be construed to extend to such paupers as were born before the township was erected. It declares, "That the commissioners shall, and they are hereby authorised and required to divide the said parish

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into two or more townships, to be called and distinguished by such names as the said commissioners shall appoint, and when the same shall be so divided, each and every such township shall *from thenceforth for ever thereafter* provide for *its own poor*, make and maintain its own roads, &c." This language is clearly prospective, and leaves no doubt upon the question.

The Court took time to consider of the case, and

ABBOTT, C. J. now delivered the judgment of the Court:—

The question in this case arises upon the local and personal act of the 52 *Geo. 3*, which passed for the inclosure of the forest of *Delamere*. By that statute the district called or known by the name of *Delamere Forest*, is required "to be divided into two or more townships, to be called and distinguished by such names as the commissioners shall appoint, and when the same shall be so divided, each and every such township shall, from thenceforth for ever thereafter, provide for its own poor, make and maintain its own roads, and have, enjoy, and be vested with such and the like powers, privileges, and immunities, and be subject to the same regulations as are incident to, and as are had, held, and enjoyed by the several other townships within the county of *Chester*." It appears from the case, that at the time this statute was carried into execution, the forest of *Delamere* was extra-parochial, and that this district was erected into a township by the name of the township of *Oakmere*, and the question is, whether the district thus newly erected into a township under the statute, is to be considered as having been formerly a parish or township, or only as becoming so from the time of its creation under the act. We are of opinion, that the latter is the true effect of the statute. If the former construction were to be adopted many incon-

veniences and much litigation would ensue. Many pa-
 rishes, where paupers have been legally settled, might re-
 lieve themselves from their burthens, by removing to this
 new township, not only legitimate persons born within the
 district whereof it forms a part, but others also who had
 gained settlements by service or by renting tenements.
 By these means, and by force of this construction, many
 persons might be thrown at once upon the new town-
 ship. It is true, on the other hand, that if the new
 township has overseers, they may have power to remove
 the persons thus transferred to it, which the inhabitants of
 the district of themselves could not legally do. But then
 the inhabitants were not previously under the same legal
 obligation to maintain their poor, as a parish or township;
 and, consequently, such persons would find their way into
 those parishes or townships which were compelled to
 maintain them. Under these circumstances, even if we
 were to hold that this district had previously been a
 township, still the inhabitants might have prevented these
 burthens from falling upon them, by the removal of un-
 married women with child, or persons coming to settle on
 tenements, especially before the 35 Geo. 3. c. 101, up to
 which time such persons would not acquire a settlement
 for themselves, nor could a settlement be derived under
 them. Now this is not like the case of a modern ap-
 pointment of overseers in a place where there formerly
 were none, for all those places must have been reputed
 villis from time immemorial, and were therefore con-
 stantly under a legal obligation to maintain their own
 poor, and to appoint an overseer, and by that appoint-
 ment to remove persons who were burthensome. The
 consequence of this decision is, that both the orders must
 be quashed.

Orders quashed.

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Saturday,  
May 18.

In the Matter of KAYE.

The statute 12 Geo. 1. c. 34. s. 3. makes it an offence for clothiers and other manufacturers to pay the wages of their workmen in goods instead of money; the statute 22 Geo. 2. c. 27. creates several new offences, and extends the provisions of the preceding statute to silk manufacturers; and the 17 Geo. 3. c. 56. s. 22. takes away the *certiorari* upon convictions under the 22 Geo. 2. A silk manufacturer having been convicted under 12 Geo. 1. c. 34. s. 3, and 22 Geo. 2. c. 27.—Held, that he was not deprived of the *certiorari* by force of the 17 Geo. 3. c. 56.—Held also that the six months limited by the statute for bringing the *certiorari* was to be computed from the time the conviction was affirmed by the Sessions, and not from the time of the conviction by the Justices below.

**T**HIS was a motion for a *certiorari* to remove into this Court for the purpose of being quashed, an order of the Town Sessions of Nottingham, confirming a conviction by two Justices, of a person named *Kaye*, a silk manufacturer, under the statutes 12 Geo. 1. c. 34. s. 3, and 22 Geo. 2. c. 27. s. 12, for paying *Rogers*, one of his workmen, in goods, instead of money, as wages for his labour, by which order he was compelled to pay him over again in money. The only question on the present occasion was, whether the *certiorari* was taken away by 17 Geo. 3. c. 56. s. 22. The 12 Geo. 1. c. 34. s. 3, regulates the payment of workmen in the woollen and certain other trades, and prohibits payment of their wages in goods under certain penalties. The 22 Geo. 2. c. 27. s. 12, recites that clause, and extends its provisions to the silk trade, in which the defendant *Kaye* was engaged; but that act contains many other clauses creating several new offences. The 17 Geo. 3. c. 56. s. 22, enacts, among other things, that no order made touching or concerning any of the matters contained in this act, or any proceedings to be had touching the conviction of any offender or offenders against the 22 Geo. 2. c. 27, shall be removed by *certiorari* into this Court.

*Denman*, C. S. shewed cause against the rule, and objected, first, that the application was out of time, six months having elapsed since the conviction; and, second, that by the true construction of the 17 Geo. 3. c. 57, the *certiorari* was taken away in all cases, not only under the

22 Geo. 2, but also under the 12 Geo. 1, by force of the 12th section of the former of these two, which embodied the provisions of the latter.

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Scarlett and *N. R. Clark, jun. contra*, were stopt by the Court.

Per Curiam.—As to the first objection, it is clearly not available, because the six months must be computed from the time when the order of Sessions was made; and as six months have not elapsed since then, the application does not come too late. Then, as to the second objection, upon referring to the different acts of parliament which have been mentioned, it appears to us that the 17 Geo. 3. c. 56. s. 22, cannot be construed to take away the *certiorari* in this case. That statute only takes away the *certiorari* in cases of conviction under the 22 Geo. 2. c. 27. s. 12. The offence, in this case, is an offence against the 12 Geo. 1. c. 34: the third section of which regulates the payment of wages in money instead of goods; but the 22 Geo. 2. creates several new offences, and extends the provisions of 12 Geo. 1, to other manufactures; but it does not in express terms embody that section which regards the payment of wages. The 22 Geo. 2, creates specific offences which are not punishable under the 12 Geo. 1. Then the question is, whether by the 22 Geo. 2, which extends the 12 Geo. 1, to other branches of manufacture, an offence committed against the latter, can be considered as an offence against the former. We are of opinion that, as the 22 Geo. 2, makes a variety of new substantive offences in addition to those created by the 12 Geo. 1, the statute 17 Geo. 3, which only recites the different provisions of the 22 Geo. 2, does not attach to the 12 Geo. 1, and therefore the rule for a *certiorari* must be made absolute.

Rule absolute.

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Saturday,
May 18.

The KING *v.* The JUSTICES of SOMERSETSHIRE.

The Court will not grant a *certiorari* in the first instance to remove the order for the appointment of overseers for the purpose of having it quashed, on a suggestion, that the Justices made the appointment from corrupt and improper motives—the propriety of the appointment being matter of appeal to the Sessions: but they will grant a criminal information against the Justices, if the corrupt and improper motive for making the appointment be satisfactorily established.

ADAM moved for writ of *certiorari* to remove into this Court the appointment by two Justices of four overseers for the parish of *Shepton Mallet*, in order that it might be quashed, on a suggestion that the appointment of the overseers in question was founded in corrupt and improper motives. The affidavits stated that one of the overseers appointed was not a house-keeper; that the others were farmers living at an inconvenient distance from the parish; that one of them was a tenant of the appointing magistrate, whose conduct was the subject of complaint; and that all of them were persons acting under his influence.

Per Curiam.—We cannot suspend the jurisdiction which the law has given to the Justices. If the appointment has been improperly made, it may be appealed against at the Sessions. The mere impropriety of the appointment is not a ground for removing it into this Court by *certiorari*, in order that it may be quashed. In point of regularity the Sessions is the tribunal for setting the matter right, and quashing the appointment, if it is improperly made. If the magistrates have acted corruptly in appointing persons who ought not to be overseers, that may be the foundation of a motion for a criminal information against them, if the corrupt motive can be satisfactorily made out; but otherwise the usual and most proper remedy is by appeal to the Sessions.

Rule refused (*a*).

(*a*) See *vide* *Rex v. Great Marlow*, 2 East, 244. *Rex v. James*, 2 M. & S. 322. *Rex v. Bridgewater*, Cowp. 139, and *Rex v. Standard Hill*, 4 M. & S. 378.

1822.

Monday,
May 20.

The KING v. The JUSTICES of MANCHESTER.

UPON a rule nisi for a *mandamus* to the defendants to enter continuances, and hear an appeal against the allowance by two Justices of the constable's accounts for the township of *Ashton-under-line*, it appeared that the officers of the township consisted of four churchwardens, and four overseers. At a meeting of the inhabitants of the township, the last quarterly accounts of the constable were submitted to audit and inspection, and the accounts were disallowed; upon which the constable, in pursuance of the statute 18 Geo. 3. c. 25. s. 4. submitted his accounts to two county Justices, by whom they were examined and allowed. One of the overseers, without the concurrence and against the approbation of the remainder, appealed to the Sessions against the allowance of the Justices, in his own name, and the Sessions dismissed the appeal, on the ground that the other overseers and the churchwardens did not join in the proceeding. The question now raised in argument was upon the construction of the appeal clause in the above-mentioned statute, which enacts, "that in case *the overseer or overseers* of the poor of the said parish, township, &c. *shall find* that the parish, township, &c. is aggrieved by any neglect, act, or thing done or omitted by the said constable, &c. or by any of his Majesty's Justices of the Peace, or shall have any material objection to such account, or any part thereof, or to such determination as aforesaid, it shall and may be lawful to and for *such overseer or overseers*, in any of the cases aforesaid, giving reasonable notice, &c. to appeal to the next General or Quarter Sessions," &c.

The statute 18 Geo. 3. c. 25. s. 5. gives an appeal to the Sessions against the allowance by two Justices of constable's accounts, "in case *the overseer or overseers* shall find that the parish or township is aggrieved" thereby; but the right of appeal cannot be exercised by one overseer without the consent of the majority. Therefore where a township had four overseers and four churchwardens, and seven were for allowing the constable's accounts, against the sense of the eighth, and a majority of the lay-payers; and two Justices afterwards allowed the accounts: Held, that the single overseer could not appeal against the allowance in his own name, and this Court refused a *mandamus* to the Sessions to hear the appeal.

Coltman now shewed cause against the rule, and contended, that according to the true construction of 18 Geo. 3.

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c. 19. s. 5. it was not competent for *one* overseer of the township to appeal against the allowance of the constable's accounts without the authority of the rest of the churchwardens and overseers, or at least a majority, inasmuch as the determination to appeal is a deliberative act in which all the officers of the township must join. This was the plain meaning of the appeal clause, and could not be controverted. This case was distinguishable from *Rex v. Pascoe (a)*, cited when the rule nisi was obtained, because there the act done by the single overseer was not a deliberative act, and therefore did not require the concurrence of the other parish officers. Here the act was deliberative, because the overseers and churchwarden must find that the township is aggrieved before they appeal, and therefore the Sessions did right in dismissing the appeal.

*J. Williams*, contra, relied upon *Rex v. Pascoe* as an express authority, though the question there arose upon the 50 Geo. 3. c. 49. That was a case where the accounts of overseers had been allowed by two Justices at Special Sessions, and an order made to pay the balance over to their successors, which order was confirmed on appeal, but the outgoing overseers having refused to pay over the balance, it was held, that two Justices might issue their warrant to levy it under that statute, upon the application of *one* of the succeeding overseers, although the rest of the churchwardens and overseers refused to concur in the application; and this Court granted a *mandamus* to the Justices to compel them to issue their warrant upon the application of the single overseer. Now this case is within the reason and principle of that decision. Referring to the language of the appeal clause of the statute in question, the reasonable construc-

(a) 2 M. & S. 343.

tion is, that any *one* overseer, if he be dissatisfied with the accounts, may institute an appeal, for the words are, "*the overseer* or overseers;" and unless it is said that the words "*the overseer*" refer only to the case of a parish having but one overseer, the plain intendment of the statute is to give the right of appeal to any one overseer who may be dissatisfied. If this construction be not given to the clause, the great body of the lay-payers can have no relief in any case even where the grossest injustice and dishonesty may appear in the conduct of the constable. A majority of the overseers may decide against the minority, and obstruct that justice which it is the object of the legislature to extend to those who are most interested in the faithful disbursement of the parish money. In this case the great body of the lay-payers were dissatisfied with the constable's accounts, and unless it is decided that they may appeal through the instrumentality of one overseer, the most inconvenient and unreasonable consequences must follow.

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ABBOTT, C. J.—It is much to be regretted that not only in different acts of parliament, plainly enacted with a view to the same object, but even in different sections of one and the same act of parliament, there should be found a variation of phraseology calculated to introduce confusion. The duty of the Court is to find out the meaning of the particular passage of the section in question, and, in so doing, to look not only to the words, but to the whole of the sentence and the context, and to see whether the mischief which has been pointed out in argument, was that which the legislature intended to remedy. The present question arises upon the 18 Geo. 3. c. 19. with regard to the allowance of the constable's accounts. The constable is, in the first instance, to deliver in his accounts to the overseers, whatever be their number. They

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having received his accounts, are to lay them before the rated inhabitants, in order to ascertain whether they are correct. If the rated inhabitants, or lay-payers, are dissatisfied, they may object to pay the constable's demand, but then the constable is not to be left entirely to the mercy of those out of whose pockets the expences incurred by him are to come; for if at the meeting of the lay-payers it is determined not to pay the constable, he has a right to go before two Justices of the Peace, and to have his account allowed by them, if they shall think fit. Then the fifth section gives the appeal, and enacts, "that in case *the overseer* or overseers of the poor are dissatisfied with the determination of the Justices, it shall be lawful for *such overseer* or overseers to appeal to the Quarter Sessions, and the Justices there assembled are required to receive such appeal, and to hear and finally determine the same." The question is, whether we are to read the words "*the overseer* or overseers" as they are found in this section, in the same sense as *an* overseer or overseers. The same phrase "*the overseer* or overseers" occurs in the 6th section, which provides, "that in all corporations or liberties which have not four Justices of the Peace, it shall be lawful for *the overseer* or overseers of the poor of the parish, township, or place, where an appeal is given by this act, to appeal, if *he*, or they shall think fit, to the next General or Quarter Sessions." It is urged, that unless it is permitted to one overseer to appeal, the parish may sustain great injury, because it is possible that the majority of overseers may be col-leaguing with the constable, and may be desirous of doing that which the inhabitants think ought not to be done. That may be so, but on the other hand it is possible that one overseer out of many, if he has the power of appeal against the order of the Justices, may employ that power without the concurrence of the

majority of the lay-payers, for the purpose of sanctioning an improper account of the constable. But the expression contained in this act of parliament, "that in case *the overseer* or overseers shall *find* that the township is *aggrieved*," seems to import that this is to be an act of deliberation on the part of the overseers, whether the *inhabitants* of the parish are satisfied or not. That leads me to think, that the legislature intended that where there are more than one overseer, there should be the concurrence of a majority in the act of finding that the parish is aggrieved, and that the appeal then only is proper. Another circumstance in this particular act of parliament, which leads to the same conclusion, is, the clause which gives costs; for I apprehend, that if an appeal were brought by a majority of the officers on the part of the parish, and the appeal should fail, and the Justices at Sessions should award costs to the constable, he would have a right to have those costs reimbursed, not merely out of the pocket of the overseer, but out of the parish funds, and it is a peculiar reason for giving the power of determining whether an appeal should be instituted or not, that costs are an incident to the exercise of that power. For these reasons it appears to me, upon the best consideration which I have been able to give to this act of parliament, that if there be a single overseer only in a parish, he shall have the right to appeal; but that if there are several, there must be the opinion of the majority concurring in the determination to appeal, in order to authorize the proceeding. The difference between the language of the statute 50 Geo. 3. c. 49, upon which the case of *Rex v. Pascoe* was decided, and that of the present statute, is certainly very slight; the word in the former is, "overseers," without the definite article *the*, and no doubt there may have been very good reasons for the decision in that case, because, as the burthen of the proceeding might fall upon the parish, the question

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there was, whether, upon reference to the statute, less than the majority of the overseers could concur in the application for a warrant to levy the money; and the Court were of opinion, with this view, that an overseer might make the application to the Justices for their warrant, in order to avoid unnecessary expence. For the same reason, as the process of appeal might lead to very considerable expence, I am of opinion that the meaning of the statute is, that the proceeding must be instituted by a majority of the overseers on the part of the parish, because in case of failure in the appeal, the costs would come out of the pockets of the parishioners. I think the present case is distinguishable from *Rex v. Pascoe*, and consequently this rule must be discharged.

BAYLEY, J.—This case is perfectly distinguishable from *Rex v. Pascoe*. The statute 50 Geo. 3. c. 49. declares, that the outgoing overseer is to pay the succeeding overseer, the balance remaining in his hands, and it is the duty of the succeeding overseer to take care that that balance is paid, and the payment of it must of necessity be beneficial to the parish at large, because so soon as it is paid, the money is applicable in aid of the parish expences. All that the Court decided in that case was, that when it was found there was a balance in the hands of the outgoing overseers, any one of the succeeding overseers might obtain a warrant from two Justices to have the money levied, and the Justices were bound to grant the warrant in aid of the overseer. The warrant in that case was granted on the application of a person, whose duty it was to make that application for a purpose beneficial to the parish at large. In the present instance, the appeal *may* be beneficial to the township; but it may possibly be prejudicial to it, by reason of the costs which it may occasion. If it had been the

intention of the legislature that one single overseer out of many might act upon his own judgment, and might himself institute an appeal, I should have expected the language of the act of parliament to have been different. The words are, "*the* overseer or overseers, and if *he* or they shall *find* that there are grounds of complaint on the part of the parish, *he* or they shall have a right of appeal." The word "find" implies judgment and deliberation, but that must apply to the whole body of the overseers, and cannot be limited to an individual overseer where there are more than one.

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HOLROYD, J.—I am of opinion that the right of appealing is given by this statute to the overseers as a body, and not individually. It is given to one, if there be but one, in the parish or township; but if there be more than one, the power is to be exercised by the majority; and upon this principle, that the act of the majority is the act of the whole, if the power is given for any general or public purposes. *Grindley v. Barker*(a). The right of appeal here is not given to the whole body of the overseers at all events, but only in a particular event, and that is, in case the overseer or overseers for the time being shall *find*, that the township is aggrieved by any act done, or omitted by the constable. Until the grievance is found and ascertained by them as a body, no appeal is given. I am therefore clearly of opinion that this rule must be discharged.

BEST, J. concurred, and said, that the Court would be doing violence to the act, in holding that one overseer might appeal against the opinion of the majority.

Rule discharged.

(a) 1 Bos. & Pul. 229. Vide *Cooke v. Loveland*, 2 Bos. & Pul. 31, and *Rex v. Foxcroft*, Burr. 1017.

1822.

Monday,  
May 20.

## The KING v. The JUSTICES of FLINTSHIRE.

An order of Sessions for assessing and levying a specific sum of money, to enable the county treasurer to repay persons who had advanced money for county purposes, on the credit of the county rates, is bad on the face of it, inasmuch as it is a rate to reimburse, which the Sessions have no authority to make.

ON shewing cause against a rule for a *certiorari* to remove into this Court, an order made by the defendants at Sessions, "for levying and paying into the hands of the treasurer of the county of *Flint*, the sum of 200*l.* 5*s.* 6*d.*, to enable him to pay that sum in part payment of the claim of Messrs. *Sankey*;" it appeared that money had been borrowed from time to time from Messrs. *Sankey*, bankers at *Holywell*, by the county treasurer, under the sanction of an order of Sessions, authorizing him to raise money upon the credit of the county rates, for the public purposes of the county. Great part of the money so borrowed had been repaid, but a balance of 447*l.* 15*s.* 6*d.* remained due, and at the last *July* Sessions an order was made for assessing and levying a county rate for the purposes above mentioned. It was now objected, that this rate was bad upon the face of it, being made specifically for the purpose of reimbursing the individuals therein named. No objection was made as to the appropriation of the money to the public purposes of the county. It was conceded that the money borrowed had been properly applied, but

*The Court* said, that the rate was clearly bad in point of form. It was a rate professedly made to *reimburse*, which the Justices had no authority to order, unless sanctioned by act of parliament. A rate might be generally made for certain objects, and might be applied to reimburse individuals who had advanced money for those objects; but a rate to reimburse could not be supported. The *certiorari* therefore must issue; but probably all par-

ties would be satisfied with the understanding that the practice of making such rates should cease in the county.

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Rule absolute.

*Scarlett, Littledale, and D. F. Jones*, for the defendants, and *Parke* for the prosecutor.

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**C A S E S**  
 IN THE  
**COURT OF KING'S BENCH,**  
 FOR THE USE OF  
**Justices of the Peace.**

TRINITY TERM, 1822.

1822.

Saturday,  
June 8.

The KING v. The JUSTICES of LANCASHIRE.

**I**N a former Term a mandamus having issued, commanding two Justices to appoint overseers for three places, called *Polton*, *Bere*, and *Torrisholme*, stated to be all comprehended in one township, in the county of *Lancaster*, the defendants made a return, stating, that the places in question were three distinct townships, and not one, as was urged for the prosecution. The prosecutors then moved for a criminal information against the defendants for an alleged false return. There was no suggestion that the defendants had acted corruptly, or from any improper motive; but it was contended, that this was the most proper mode of proceeding against Justices for making a false return to a mandamus; for though an indictment would lie, yet, as the Grand Jury, to whom the bill should be presented, might possibly be composed of county Justices, such mode of proceeding might not be attended

*Quære*, whether a criminal information will lie against Justices for making a false return to a mandamus, unless the return is corruptly and wilfully false?

Where Justices had made a false return to a mandamus to appoint overseers for a township, and the Court had thereupon granted a rule nisi for a criminal information; and, on shewing cause against that rule, contra-

dictory facts were disclosed, which were directed to be tried by an issue, and after an issue had been prepared and delivered, the Justices had abandoned the issue, and obtained a Judge's order for staying proceedings, without prejudice to the question of costs, the Court ordered the Justices to pay the prosecutor the costs of preparing and delivering the issue.

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with success; and *Rex v. Spotland* (a) was cited as an authority in point for the proceeding by information; and the Court, acting upon that case, granted a rule nisi. On shewing cause against that rule, contradictory affidavits were filed as to the fact, whether the places above mentioned were three distinct townships or not; and the Court, having suggested that the fact was proper matter to be tried by an issue, the Justices consented to an issue; and it was ordered that in the mean time the rule for a criminal information should stand over until this Term. An issue was accordingly prepared for trial at the last assizes for *Lancashire*; but on the eve of the assizes the defendants gave notice of their intention to abandon the issue, and all the proceedings were stayed by a Judge's order, without prejudice to any question of costs of preparing the issue.

The case was now called on in the peremptory paper, and it being agreed that the rule for a criminal information should be discharged, on the terms of the defendants paying the costs, which had been incurred by the prosecutors in preparing and delivering the issue,

*The Court*, acting upon the ordinary practice where parties consent to try an issue, and the defendant abandons the proceedings, the plaintiff is entitled to his costs, thought it reasonable that the defendants, in the present instance, should pay the costs of the issue; and the rule for a criminal information was accordingly discharged upon those terms.

*Parke* for the prosecutors, and *Scarlett* for the defendants.

(a) Cas. Temp. Hardw. 184. See *Rex v. Pettward*, 4 Burr. 2452. On a subsequent day in this Term, the Court granted a rule nisi for an information against Justices under the like circumstances, but the Court expressed a doubt whether an information would lie unless the return was corruptly and wilfully false.

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Tuesday,  
June 18.The KING *v.* MARY ANN CARLILE and Another.

**T**HESE defendants *Mary Ann Carlile*, and *Jane Carlile*, having been severally convicted of publishing blasphemous libels, were respectively adjudged to different terms of imprisonment in his Majesty's gaol at *Dorchester*.

*J. Evans* now moved for an order upon the keeper of the gaol, that the defendants should be allowed the same use of air and exercise, as was permitted by the rules and regulations of the prison to prisoners confined therein for felonies, suggesting, upon affidavits, that the defendants were treated in a different manner from that of persons of the description last mentioned.

*The Court* asked, what authority they had to interfere with the management and regulations of a prison in this summary manner?

*Evans* referred to 31 Geo. 3. c. 46, as shewing that the King's Justices had a superintending authority over the rules and regulations of every prison in the kingdom; and he submitted, that by force of that statute the Court might make such order upon the gaoler as they thought proper, touching the treatment of any prisoner in his custody. It seemed to be perfectly clear, that the Court of *King's Bench*, which had a general superintendence over all persons who are in any respect ministers of justice, may award an attachment against any gaoler using a prisoner barbarously and inhumanly, 2 *Hawk. P. C.* 22. s. 32. Nothing could be more important than that the gaols of the kingdom should be well governed, and it was

This Court has no authority to interfere in the regulation and management of the gaols of the kingdom. Therefore, where persons guilty of a misdemeanor, and confined in a county gaol under the sentence of this Court, prayed to be allowed the same indulgences as prisoners confined for felony, the Court refused to make any order upon the gaoler for that purpose.



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REX  
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perfectly competent to this Court to take notice of any thing improper in the conduct of a gaoler. In the exercise of that superintending authority vested in the Court, this seemed to be a proper case for their interference. No instance could be cited, certainly, in which the Court had so interfered; but on a recent occasion, in the case of a person named *Hunt*, confined in *Ilchester* gaol, the Court had made an order, that the prisoner in that instance should have certain accommodations allowed him which had been denied by the gaoler. In this case, the affidavits stated, that the defendants were treated in a manner different from other prisoners, and there seemed no good reasons for such a distinction.

ABBOTT, C.J.—We are willing to do that which by law we have the power of doing, but we cannot go beyond the authority which the law has vested in us. It is not in our power to interfere with the regulations of prisons which are placed entirely under the management and control of the County Justices, subject undoubtedly to the approval of Justices of Assize, Great Session, and Oyer and Terminer or Gaol Delivery at the Assizes, according to the provisions of the statute 31 *Geo. 3. c. 46*. But we have no authority whatever to interfere with the regulations of the prison, the Legislature having provided for those regulations in another manner. I am not aware of any instance in which this Court has granted an attachment under circumstances like the present. If a gaoler behaves ill, he is liable to be punished, and if he treats his prisoner barbarously and cruelly he may be indicted. In the case of the *Ilchester* gaoler, we made no order affecting the regulations of the prison; all that we did in that case was to allow the prisoner the means of swearing an affidavit, in order to enable him to make an application to this Court. Unless, therefore, some

authority is found justifying this interference, we cannot make any order.

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The rest of the Court concurred; and

*Evans* took nothing by his motion.



The KING v. THOMAS JAMES.

Tuesday,  
June 25.



ON the return to a habeas corpus directed to the keeper of His Majesty's gaol at *Caermarthen*, it appeared that the defendant *Thomas James* had been committed to the custody of that gaoler, under a warrant of two Justices, in the following terms:—" *Caermarthen*, to wit. To the constable of the parish of *L.*, and especially to *John Jones*, keeper of the common gaol, &c. Receive into your custody the body of *Thomas James*, herewith sent to you by two of His Majesty's Justices of the Peace, and charged by us the said Justices upon the view of us, for insulting behaviour towards us the said Justices, by telling us that we were prejudiced and biassed as Magistrates, towards him the said *Thomas James*, in the execution of our office, against the peace, &c. and him safely keep in your custody until he shall be discharged by due course of law," &c.

A commitment for punishment must be for a time certain; therefore, where a defendant was committed by two Justices for a contempt towards them in their office, "until discharged by due course of law," held that the commitment was bad.

*Campbell*, for the defendant, submitted that this commitment was clearly bad upon the face of it, it being a commitment for punishment as for a contempt, without any term certain. There was never any instance of a commitment for a contempt until the party was discharged "by due course of law." Commitment for punishment must be for a time certain.

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*W. E. Taunton* endeavoured to combat the objection,  
but

*The Court* were clearly of opinion that the commitment was bad upon the face of it, and ordered the defendant to be discharged.



Tuesday,  
June 25.

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Mandamus will not lie to the lord and steward of a manor to inspect court rolls, for the purpose of supporting an indictment against the lord, for not repairing a road within the manor.

The KING *v.* Lord CADOGAN and Another.

**T**HE defendants were indicted for not repairing a road,  
and

*Talfourd* moved for a mandamus to Lord *Cadogan*, and to the steward of the court-leet of the manor of which the defendant was lord, commanding him to permit the solicitor for the prosecution to inspect the court rolls of the manor, for the purpose of obtaining evidence necessary to support certain averments in the indictment; but

*The Court* said, that though this might in substance be a civil proceeding, yet in form it was criminal, and they could not compel the defendant to furnish evidence against himself for the purpose of supporting the indictment.

Rule refused.

END OF TRINITY TERM.



## MICHAELMAS TERM, 1822.

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The KING v. The INHABITANTS of ALL SAINTS,  
in CAMBRIDGE.

Wednesday,  
Nov. 13.

**BY** an order of two Justices, *Lydia Fowler* was removed from the parish of *The Holy Trinity* to the parish of *All Saints*, both in the county of *Cambridge*. On appeal, the Sessions confirmed the order, subject to the opinion of this Court, upon the following case :—

The pauper's maiden settlement was in *All Saints* parish. In the year 1793 she married one *William Fowler*, a chair bottomer and mat-maker, with whom she travelled about the country, and who had no legal settlement unless the following be adjudged so. In 1807 he hired a house in the parish of *Saint Peter's, Cambridge*, of the value of 9*l.* 10*s.* per annum, and resided therein with his family above a year; during the same time he had two separate parol contracts for two ponds, or for the rushes and flags growing therein, under the following circumstances :—One of the ponds was of the extent of three acres, in which he was to have the exclusive right of cutting the rushes and flags at his pleasure, but not of draining off the water; the owner had the right to use the water, or drain it off as he thought proper; for this the pauper was to pay 5*s.* a year to Mr. *Cawcutt*, the occupier of the farm in which it was situated. The pond was not fenced off from the rest of the field; and Mr. *Cawcutt's* cattle, when depasturing there, used the pond for drinking at; but the rushes and flags were not such herbs as the cattle would eat. The other pond was only about a quarter of an acre, occupied under circumstances similar to the preceding, at the like yearly rent of 5*s.*, and two door mats of the value of 2*s.* The next

Where a person rented and resided on a tenement of 9*l.* 10*s.* a year, and during the same time contracted by the year for two ponds, or for the rushes and flags growing therein (he being by business a chair bottomer), the owner of the ponds reserving to himself the use of the water as he thought proper, the rent agreed for being 5*s.* a year for one pond, and 5*s.* and two door mats of the value of 2*s.* for the other :—Held, that he thereby acquired a settlement.

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year he agreed to pay 10s. for the same, but died before all the rushes were gathered. The contracts for the ponds subsisted during all the time the pauper occupied the house in *Saint Peter's*.

Starkie, in support of the order of Sessions, made two points, first, that it was a mere personal contract for the sale of the growing rushes, with liberty to the vendee to enter the land of the vendor for the purpose only of cutting them down; and consequently that the pauper's husband did not rent a tenement within the meaning of the statute, so as to confer a settlement on the wife; and second, assuming this to be a tenement within the meaning of the statute, there was no occupation by the pauper's husband of a tenement of the value of 10*l.* for forty days. As to the first point, it appeared from the facts of the case, that the pauper's husband had merely a chattel interest, namely, the privilege of cutting rushes accidentally growing by the sides of the ponds in question, subject to the right of the owner to use the water and soil of the ponds, and to drain off the water at his pleasure, and as a consequence to suffer the rushes to grow or not, as he might think proper, and also to the right of the owner's cattle to eat or destroy the crop of rushes (the ponds not being fenced off) should they happen to meet with no food of a more palatable description. All these were circumstances which completely negatived the presumption of any interest in the land vested in the pauper's husband, so as to confer a settlement. It was true that he was to pay so much a year for the rushes; but that must mean only, so much for the crop. As well might it be said that a contract for the purchase of a crop of growing apples, with the privilege of entering the orchard to gather them, would confer a settlement. Both cases were precisely analogous in principle. Upon this point he

cited *Rex v. Old Arlesford* (a), *Rex v. Stoke* (b), *Rex v. Brampton* (c), *Warwick v. Bruce* (d), *Parker v. Staniland* (e), *Emmerson v. Steelis* (f), *Crosby v. Wadsworth* (g), and *Pincomb v. Thomas* (h). Then, secondly, assuming this to be a tenement, still there was not a residence upon a tenement of 10*l.* for forty days, inasmuch as the value of the crop of rushes would diminish *de die in diem*, according as the pauper's husband might choose to cut them down. It must be shewn that the occupant has an interest in the land of the requisite value during the whole period of forty days. Now, for any thing that appeared in the case, the whole or great part of the crop might have been cut down before the forty days expired; and if so, it was clear from the authority of *Rex v. Bowness* (i), that no settlement was gained. In that case the pauper rented a dwelling-house, and other premises, of the annual value of 4*l.* for a whole year, and he bought a crop of growing oats by auction during the year for the price of 12*l.* 14*s.* The oats were bought on the 12th of *August*, and were of different kinds, and ripened at different periods, and he began to reap them on the 14th of *September*, and continued reaping them as they ripened, and carted them away at intervals between the 14th of *September* and the 3d of *October*, on which day he carted off the last load. The question was, whether, under such circumstances, he gained a settlement? And in giving judgment, *Le Blanc*, J. said, "There is one objection to which no answer has been given. It is admitted that the party must have come to settle in a tenement, that is, must have resided in the parish in which he held a tenement of the value of 10*l.* for forty days. Now, in this

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(a) 1 T. R. 358.

(b) 2 Ibid. 431.

(c) 4 Ibid. 348.

(d) 2 M. & S. 205.

(e) 11 East, 562.

(f) 2 Taunt. 38.

(g) 6 East, 602.

(h) Cro. Jac. 524.

(i) 4 M. & S. 210.

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instance, allowing all that has been stated as the law to be correct, and the authorities to apply, and granting that this was a tenement, how can we say that this person has resided forty days in the parish, while he held a tenement of the value required? He rented the dwelling-house and other premises of the annual value of 4*l.* for the whole year, and he bought a crop of oats by auction on the 12th of *August*, which he began to cut on the 14th of *September*, and it does not appear but that he carried the greater part in value of the crop before the expiration of forty days from the time of his first purchasing it; and if that were so, his interest would have ceased *pro tanto* within the forty days, and he would not have held a tenement for that time of the annual value of 10*l.* Therefore, on the ground that it does not appear that there has been a holding for forty days of a tenement of the value of 10*l.* a year, I think that the order of Sessions cannot be supported." It seemed therefore that this was a decisive authority upon this question, and consequently the Sessions did right in affirming the order.

Storks, contra, was stopped by the Court.

ABBOTT, C.J.—I confess I am not able to draw any distinction in principle between grass and rushes or flags growing. Taking a crop of grass has been over and over again held to be the taking a tenement, that is, the taking of such an interest in the land as will confer a settlement. If it had been a bargain for a particular crop of rushes, and could be said to be a mere sale, then it would be only matter of personal contract, which was the case in *Rex v. Bowness*. But this is not a contract for the sale of a particular crop of rushes, which the man is to take away as soon as they are in a fit state to be severed. The contract here is for all the rushes growing during the year; for which he is to pay a yearly rent, according to the very

terms expressed in the case. So that he is entitled not merely to cut one crop, but as many rushes as shall grow upon the ponds by the course of nature during the year for which they are taken. This case therefore is in this respect perfectly distinguishable from *Rex v. Bowness*. In that it was merely a contract for a single crop of oats; but here the pauper's husband is entitled to take as many crops as shall grow during the year, for which he is to pay a yearly rent.

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BAYLEY, J.—I am of the same opinion. I think this is not merely a private contract for the sale of a growing crop of rushes, but that it is taking a tenement within the meaning of the statute, according to the principle of decided cases. It is clear that the pauper's husband had an interest in the soil according to the terms of the agreement. He had a right to have the soil applied to the growth of the rushes, and the person with whom he agrees had no right to destroy the crop by subtracting the soil from which it sprung. This, it will be recollected, was a growing crop, and the case in this respect is perfectly distinguishable from those cases where the growth of the subject matter of the contract was complete, so as to make it only a sale of goods and chattels. Here the man has an interest in the soil, and the contract is for a year. If this be so, then the second ground of argument which has been taken completely fails, namely, that there was no residence for forty days upon a tenement of 10*l.*, because the value of the crop would be diminished by its severance from day to day before the forty days expired, and therefore it could not be said that during that period he occupied a tenement of the requisite value. It is impossible for such an argument to hold good, because, if it is to prevail, it must be carried to this extent; that if a man takes grass land clearly worth 10*l.* a year, and on the thirty-ninth day he cuts down and carries away the whole

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produce of the land, he gains no settlement. If the argument is good for any thing it must go that length. I am clearly of opinion, upon the principle of the numerous cases which have been decided on questions of this nature, that a settlement has been gained under the circumstances of this case.

HOLROYD, J.—I am also of the same opinion. The whole of the rushes were not to be cut at one time; but the pauper's husband had a right to take successive growing crops, and he was the only person who could enter the land and enjoy that species of property. He had not only a right to the crop growing at the time of the contract, but he was entitled to have the soil in the land applied to successive crops as long as the contract continued. Supposing the owner of the soil were to draw off the water from the ponds, still the first heavy shower of rain would replenish them, and the rushes would begin growing again.

BEST, J.—This case is distinguishable from *Rex v. Bowness*, which was merely the case of a purchase by auction of a particular crop of oats, to be cut and carried as soon as it was ripe, the pauper having at all events no interest in the land after the crop was carried; but here the pauper's husband has a continuing interest, and it is found, as a fact, in the case, that the taking of the ponds is by the year, and he is entitled to all the crops which may grow during the year.

Order quashed.

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Wednesday,
Nov. 13.

The KING v. The JUSTICES of DENBIGHSHIRE.

BY stat. 55 Geo. 3. c. 68. s. 2. which repeals 13 Geo. 3. c. 78, it is declared, "That when it shall appear upon the view of any two or more Justices of the Peace, that any public highway, or public bridleway or foot-way, may be diverted, so as to make the same nearer or more commodious to the public, *and the owner or owners of the lands and grounds through which such new highway, bridleway or foot-way, so proposed to be made, shall consent thereto, by writing under his or their hand and seal, or hands and seals, it shall and may be lawful, by order of such Justices, at some special Sessions, to divert and turn, and to stop up such foot-way, &c.*" An order having been made under this act by two Justices of *Denbighshire*, at a special Sessions held for that purpose, after reciting that a certain part of the highway between *Poolmouth* and that part of the new turnpike road leading from *Wrexham* to *Ruthin* in the said county of *Denbigh*, (describing it in length and locality, according to a plan thereunto annexed,) might be diverted and turned so as to make the same nearer and more commodious to the public, proceeded as follows: "and having viewed a course in lieu thereof, commencing at, &c. and passing along an ancient highway to, &c. where it enters the lands and grounds of the late *Thomas Jones, Esq. of Llantisilio*, and passing through the said lands to, &c. *and having received evidence of the said Thomas Jones, Esq. in his life-time, to the said part of the new road being made and continued through his lands hereinbefore described, by writing under his hand and seal, we do hereby order that the said road be diverted and turned, &c.*" On appeal to the Sessions, this order was affirmed. In *Hilary* Term a rule nisi was granted for quashing this order, on affidavit stating, that at the time

An order made by Justices of Peace, under stat. 55 Geo. 3. c. 68. s. 2. for stopping up an old highway, and setting out a new one, must shew that it is made with the consent in writing under the hand and seal of the owner of the land through which the new highway is proposed to be made. Where an order, made under this statute, recited that the Justices had received evidence of the consent of *T. J. Esq. in his life-time, to the new road being carried through his lands, by writing under his hand and seal, and it appeared that another person was owner of the land at the time the order was made:—*Held, that such order was insufficient, and could not be carried into execution.

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of making the order for diverting the road in question, the land and ground through which the said intended new road was ordered to be made, was not the property of the late *Thomas Jones, Esq.* but was the land and ground of another gentleman who had succeeded to the same on the death of *Mr. Jones*.

On shewing cause against this rule, the question was, whether the order for diverting the road made in the terms above mentioned, was a sufficient compliance with the requisites of the statute, which declares that the consent by writing under the hand and seal *of the owner* of the land and ground through which the new highway is proposed to be made, is necessary, in order to give validity to the order, it appearing at the time this order was made, that *Mr. Jones*, the person whose consent therein recited, was not the owner of the land in question.

Marryat, for the Crown, contended, that this order was sufficient, within the meaning of the statute. He submitted, that if *Mr. Jones* had, in point of fact, given a consent under his hand and seal, but died before the order was made, still it would be binding. His death would not rescind the consent which he had given, if it had been obtained as the foundation of this order. The burthen lay upon the other side to shew that *Mr. Jones's* consent had not been obtained. Indeed, the order itself stated, that *Mr. Jones's* consent had been obtained in his lifetime, and as the Sessions had acted upon that consent, it would be extremely hard that the subsequent death of that gentleman should be a ground for vacating the order. The statute had given a certain form of order which the Justices were bound to pursue, and these Justices, acting upon the consent which had been given, recited such consent in their order. The late *Mr. Jones* had been tenant for life of the land in question, and it was quite clear that a tenant

for life might give such a consent.—Even a clergyman might give such a consent. (*Bayley, J.*—He has quasi the inheritance.) The consent of Mr. *Jones* had been obtained in the first instance, as a condition precedent, in compliance with the statute, and the question was, whether his death happening before the order was drawn up, vacated the proceeding?

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SHIRE.

Gaselee, contra, was stopped by the Court.

ABBOTT, C.J.—I am of opinion that this order is insufficient. The safest construction of this Act of Parliament, is to say, that the consent of the person who is the owner of the land at the time the order for diverting the road is actually made, shall be requisite, in order to give it validity. The decision of this case, in this manner, will not touch any question that may probably arise hereafter, where the death of the owner of the land happens after the order is made, but before it is carried into execution.

BAYLEY, J.—The objection to this order is, that it does not shew that the person whose assent is necessary to give it validity was living at the time it was made; nor indeed does it appear, that Mr. *Jones* was the owner of the land at any period of time since these proceedings were in progress. For any thing that appears to the contrary his consent might have been obtained years ago, and the Justices have been acting upon a consent of long standing, which may be prejudicial to the parties now interested.

HOLROYD, J. and BEST, J. concurred.

Order of Sessions quashed (a).

(a) Vide 13 Geo. 3. c. 78. *Davison v. Gill*, 1 East, 64, and *Rex v. The Justices of ———*, 1 Chit. Rep. 164.

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Friday,
Nov. 15.

Cox, Gent. one, &c. v. COLERIDGE and Another.

A person under examination before Justices of the Peace, on a charge of felony, has no right to have a legal adviser attending on his behalf, for the purpose of giving him legal advice, still less to cross examine the witnesses for the prosecution, and to examine opposing testimony to prove his innocence. The privilege, when allowed, is entirely a matter of discretion in the Justices.

Where an attorney of this Court was retained by a prisoner, charged with felony, to attend and give him his advice and assistance during his examination before Justices, and after notice to the latter that he attended upon such retainer for that purpose:—

Held, that the

Justices might forcibly turn him out of the justice-room, and exclude his presence during the investigation of the case. *Quære*, whether this rule applies where the decision of the Justices is final, as on convictions under penal statutes, no appeal being given?

TRESPASS and assault. The first count of the declaration stated, that on the 1st September, 1818, defendants *James Coleridge*, Esq. and *George Smith*, clerk, with force and arms, made an assault on plaintiff, at *Ottery, St. Mary*, in the county of *Devon*, and seized and laid hold of, and caused and procured him to be seized and laid hold of, and forced and compelled him to go from and out of a certain room in a certain inn in *Ottery, St. Mary*, contrary to the laws and customs of this realm, and against the will of plaintiff, by means of which said several premises plaintiff was greatly hurt and injured, and was hindered and prevented from performing and transacting his necessary affairs and businesses by him at that time to be performed and transacted in the said room. Second count was for a common assault. The defendants pleaded, first, Not Guilty; second, that the assaults mentioned in the first and second counts were one and the same assault, and not other and different assaults, and that at the said time when, &c. they the said defendants were and still are two of the Justices of our lord the King, in and for the county of *Devon*, and so being such Justices, on the said 1st of *September*, in the year aforesaid, were assembled in the same room in the said first count mentioned, to take the information upon oath of the prosecutor, and the several witnesses, touching and concerning a certain felony before then charged to have been committed by one *George Brown*, and upon which charge the said *G. B.* was then in cus-

tody before them, and to examine the said *G. B.* being the party accused, touching the same, and further to do and perform there such things as should to them seem proper as such Justices aforesaid, according to the laws and statutes of this realm, and according to their office and duty as such Justices; and the said defendants further say, that plaintiff not having been summoned before them as a witness touching the matter then in examination, not being charged as a party concerned in the same, nor coming before them to testify any knowledge concerning the same, with force and arms, &c. wrongfully broke and entered into the said room, and intruded himself upon defendants; and thereupon defendants did civilly request plaintiff to leave the room, and not to intrude upon them, but plaintiff wholly refused to obey such request, and continued himself in the room intruding upon defendants for a long space of time, to wit, for the space of one quarter of an hour, in contempt of the said defendants as such Justices, and to the disturbance and violation of due order and decency in the administration of justice, and to the hindrance thereof; whereupon defendants did gently lay their hands upon plaintiff, in order to put him out of the room, and did then gently put him out of the same accordingly, as they lawfully might, for the cause aforesaid, doing him no hurt or damage thereby, which are the said supposed trespasses in the introductory part of this plea mentioned, and whereof plaintiff hath above complained against them, and this they are ready to verify, wherefore, &c. And, third, that the said room in the said first count mentioned, was a room in, and parcel of a certain common inn or public-house; and that plaintiff violently and unlawfully, with force and arms, broke and entered into the same, and intruded himself upon defendants, and disturbed them in the lawful and quiet possession and enjoyment of the same, and

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in the transacting of their lawful purposes therein; and thereupon defendants did civilly request and desire plaintiff to leave the room, to do which he wholly refused, and still remained and continued therein disturbing defendants, whereupon defendants did gently lay their hands upon him, in order gently to put him out of the said room, and did gently put him out of the same as they lawfully might, doing him no hurt or damage thereby, which are the said supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained against them, and this they are ready to verify, wherefore, &c. Replication took issue on the first plea, and as to the second plea plaintiff replied, "that he, by reason of any thing by defendants in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against them, because he saith, that before and at the said time, when, &c. he was and still is one of the attornies of the Court of our lord the now King, before the King himself, here, and well skilled in the laws, statutes, and customs of this realm, and that the said *G. B.* before the said supposed breaking, entry, and intrusion, in the said second plea mentioned, had been and was apprehended, and in custody under a certain warrant, under the hands and seals of defendants, charged with having committed the said supposed felony, and was about to be examined by defendants touching the same, whereupon the said *G. B.* stated to and informed defendants, that upon the examination of certain witnesses, the entire innocence of the said *G. B.* in the premises would appear to defendants; and plaintiff further says, that defendants did thereupon discharge the said *G. B.* out of such custody, and permit and suffer him to go at large, for the purpose of enabling him to bring such witnesses to be examined by and before defendants, at a time then prefixed to

the said *G. B.* by defendants in that behalf, touching the said supposed felony; and plaintiff further says, that afterwards, and a little before the time so prefixed to the said *G. B.*, and a little before the said supposed breaking, entry, and intrusion, in the said second plea mentioned, said *G. B.* and the said last-mentioned witnesses, being about to be examined by and before the defendants, touching the said supposed felony, and the said defendants being about to take such information as in the said second plea mentioned, he the said *G. B.* being an illiterate person, and unskilled in the laws and customs of this realm, applied to and requested and retained plaintiff as such attorney, so skilled as aforesaid, to accompany him the said *G. B.* before defendants, and to assist him the said *G. B.* with his, plaintiff's, counsel, skill, suggestions, and advice, in making his the said *G. B.*'s defence before defendants to the said charge, and in clearing himself therefrom, and shewing his the said *G. B.*'s innocence in the premises, and in examining the said prosecutor and witnesses in the said second plea mentioned, and the said witnesses in this replication first above mentioned, being witnesses then and there capable of deposing to and establishing certain facts, from which would appear to defendants the entire innocence of the said *G. B.* in the premises, and that there existed no ground whatever for suspecting the said *G. B.* to have been guilty of the said supposed felony, or in any way conusant of or implicated in the same, and further to assist and advise the said *G. B.* in the premises as far as he plaintiff was by the laws, statutes, and customs of this realm authorized, enabled, and empowered to do; wherefore plaintiff having thereupon, as such attorney, then and there acceded to the said request, and accepted the said retainer of the said *G. B.*, did, as such attorney, for and on behalf of the said *G. B.*, and at his request,

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and upon his retainer as aforesaid, accompanied the said *G. B.* before defendants, and in so doing did necessarily enter into the said room for the purpose of assisting and advising the said *G. B.* touching the premises as aforesaid, and did thereupon inform and give notice to defendants that he then was such attorney, and that he had been and was so applied to, requested, and retained as aforesaid, and that he had then and there entered the said room for the purpose aforesaid, and continued therein from thence, until the defendants, of their own wrong, committed the said several trespasses in the introductory part of the second plea mentioned, in manner and form as plaintiff hath above thereof complained against them, and this plaintiff is ready to verify, wherefore, &c. The replication to defendant's third plea was the same as to the second. Demurrer to the replication and joinder in demurrer.

Coleridge, in support of the demurrer. Two questions arise upon the pleadings in this case, first, Whether a person, who is under examination before Justices on a charge of felony, is entitled to legal advice and assistance? and, second, whether, supposing such a right to exist, there is such a connexion between an attorney and his client, as would justify the breaking and entering stated in these pleadings? It is unnecessary to dwell at any length upon the second question, the first being the most important to the defendants on this record. The prominent question then is, whether a person under examination before Magistrates, on a charge of felony, is entitled to legal assistance? No direct authority is to be found in the books upon this point. Two cases indeed have been recently decided in this Court, which deserve attention, as going nearly the whole length of the argument for the defendants; *Rex v. The Justices of*

Staffordshire(a), and *Rex v. Borron*(b). In the first of those cases, the party under accusation was brought before the Magistrates, charged with an offence against the Game Laws, and the application to the Court was for a criminal information against the Justices, on the ground that they had deprived the parties accused of the advantage of legal assistance, by ordering their attorney out of, and keeping him excluded from, the justice-room, during the hearing of the information; and *Bayley*, J. is reported to have said, on that occasion, "What right had the attorney to be there? his presence would only produce confusion and irregularity in the proceedings of the Magistrates. An attorney has no right to interfere with the duties of the Magistrate in his own justice-room. An attorney has no right to be present." It is true that that was a motion for a criminal information against the Justices, but it was refused on another ground, namely, the absence of any corrupt motive imputable to the Magistrates. If, however, that case be law, it goes the whole length of the present argument. Indeed, the case there is much stronger than the present, because the parties accused were then undoubtedly on their trial, under a penal statute, before the Magistrates, who were called upon to determine the whole of the case, and judicially to decide upon its merits. If any case could justify the interposition of a legal adviser, as matter of right, on behalf of the party accused, before Magistrates, probably no stronger instance could be put than that of an information on the Game Laws, because it might frequently happen, that in administering justice in such cases, questions of title and other points, requiring skill in the law, would arise. But *Rex v. The Justices of Staffordshire* decides, that even in such a case an attorney has no right to be present aiding, assisting,

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(a) 1 Chit. 217.

(b) 3 Barn. & Ald. 432.

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and counselling, a party on his defence before Magistrates. In the case of *Rex v. Borron* it was decided, after mature deliberation, that in the investigation of a charge of felony before a Magistrate, an attorney is only, as a matter of courtesy, permitted, but has no right to be present; nor can he comment on the evidence so as to apply the law to it, unless he be requested by the Magistrate to give his opinion and advice upon the case. There, the application was on the part of the prosecutor's attorney, who not merely required the Justice to take the examination of certain witnesses, but also claimed leave to comment upon the evidence, in order to apply the facts to the law of the case, which the Justice would not permit him to do. From the whole analogy of the law in criminal cases, it should seem that the Crown is to have the assistance of counsel, rather than the defendant. (*Bayley, J.* I apprehend, if a person, under charge before a Magistrate, has no right to the assistance of an attorney, it is clear that the prosecutor has no right to have an attorney present, interfering with the investigation). This question certainly must be tried on principle, and the facts of the case must be considered with reference to that principle. In the first place, what was the condition of *George Brown* before the Magistrates, and in the second, what was the duty which the law imposed upon the Magistrates when he was brought before them? If the party accused was in such a situation as that an attorney could have nothing to do, a strong inference would necessarily arise, that he had no right to be present at the inquiry. The fact is, that *Brown* was brought before the Justices for examination only, and not for trial, and it was the duty of the Magistrates not to satisfy their minds of the whole of his guilt, but merely to ascertain whether there was sufficient grounds to put him on his trial. For the first

of these propositions, it is hardly necessary, on the present occasion, to cite any authority, because it can hardly be said, that at the time in question, *Brown* was on his trial. Then, as he could not be considered as standing for his trial, what was the duty of the Magistrates on that occasion? Upon this point the authorities go farther than it is necessary to contend. In *Dalton's Justice*, c. 164. p. 377, it is laid down, that "if any person shall be brought before a Justice of the Peace, and charged with any manner of homicide, (other than that which shall be done in the ordinary execution of judgment) as if it were done *se defendendo*, or by casualty, which are not felonies, or done by an infant, a lunatic, or the like; yet it is the Justice's part, and safest for him to commit the offender to prison, or at least to join with some other in the bailment of him, (if the cause will suffer it) to the end the party may be discharged by a lawful trial. The like is to be done where any felony is committed, and one brought before the Justice of the Peace, upon suspicion thereof, though it shall appear to the Justice that the prisoner is not guilty; for it is not fit that a man once arrested and charged with felony, (or suspicion thereof) should be delivered upon any man's discretion, without farther trial." For this *Crompton*. 34, and *Lamb.* 229, are cited. (*Bayley*, J. Is it law at the present time, that though the Justice is satisfied that the prisoner is not guilty, it is his duty to commit him for trial?) It is not necessary on the present occasion to discuss this proposition, but the reason assigned for it is, "that it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered upon any man's discretion without farther trial." [I think that is an authority which professes too much.] In the same chapter, *Dalton* enters into a discussion as to the competency of witnesses in certain cases, and he says, "A man

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attainted of conspiracy or forgery, shall not be received to give evidence, or be a witness; but if one be brought before a Justice of the Peace, upon suspicion of felony, although the information against the prisoner shall be by such witnesses, yet it is safest for the Justice to take their information for the King, and to bind them over to give evidence, &c. and to commit the party suspected; and upon the trial to inform the Justices of gaol delivery concerning the credit of those witnesses." The next authority, which is entitled to very great weight, is 2 *Hale*, P. C. c. 14. p. 120, where it is laid down, that "If a prisoner be brought before a Justice of the Peace, expressly charged with felony, the Justice cannot discharge him, but must bail or commit him, except it should happen that no felony has been committed, or that the fact does not amount to felony. In *Hawk. P. C. c. 15. s. 1*, it is laid down, "That wherever a person is brought before a Justice of the Peace, upon an accusation of treason or felony, he must be either bailed or committed, unless it manifestly appear, that no such crime was committed, or that the cause for which alone the party was suspected, was totally groundless, in which cases *only* it is lawful to discharge him without bail." The same doctrine is laid down in 4 *Blackstone's Commentaries*, c. 22. p. 296. All these authorities are founded upon the statutes 1 & 2 P. & M. c. 13; but it is not to be supposed that those statutes were intended to enlarge the powers of Justices of the Peace. It appears, from reference to those statutes, and to *Lambard* and *Staundford*, that they were the result of much consideration on the subject, and that they were passed for remedying the abuses which had grown up in allowing persons to be improperly admitted to bail under the statutes 1 Ric. 3. c. 3, and 3 Hen. 7. c. 3. What then are the duties which the Justice is required to discharge

by 1 & 2 P. & M. c. 13. First, as to the examination; by s. 4. he is to take the informations of them that bring the prisoner before him, of the fact and circumstances of the felony, and the same, or as much thereof, as shall be material to prove the felony, shall be put in writing, and then he is to certify the examination so taken at the next general gaol delivery, to be holden within the limits of his commission. It is quite clear, therefore, what the duty of the defendants was in this case. What is the Justice to certify? He is to certify so much as is material to prove the felony, and there can be no occasion for any additional evidence, for it is put alternatively in s. 5. of the statute, which gives directions to the Coroner what he shall do in certain cases. The Coroner, by that section, is to put in writing "*the effect of the evidence given to the Jury, before him, being material;*" and Lord Hale, in his P. C. b. 2. c. 8. p. 61, points out the difference between the examination to be taken by the Coroner, and that by the Justice. He says, that by 1 & 2 P. & M. c. 13, "The Justices of the Peace are to put into writing the informations against the felon, of the fact and circumstances thereof, or so much thereof as shall be material to prove the felony; but the Coroner is to put into writing *the effect of the evidence given to the Jury, before him, being material, without saying so much as is material to prove the felony, but the whole evidence given, whether to prove or disprove the felony.*" In cap. 22. p. 157, the same learned writer again remarks upon the difference between the Coroner's Inquest and the Grand Jury. The Coroner is to hear both sides, and receive evidence from every quarter, but the Magistrates are not to do so, for he says, "The Coroner's Inquest may, and must hear evidence of all hands, if it be offered to them, and that upon oath, because it is not so much an accusation or

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an indictment, as an inquisition or inquest of office *quomodo J. S. ad mortem suam devenit*, though it be also true that the offender may be arraigned upon that presentment. But the grand inquest before Justices of the Peace, gaol delivery, or oyer and terminer, ought only to hear the evidence for the King, and in case there be *probable* evidence, they ought to find the bill, because it is only an accusation, and the party is to be put upon his trial afterwards." Could an attorney at that time have claimed admission to the Justice's room as a matter of right, upon the examination of a person accused of a crime? In the first place, at that time, there was no process so bring the witnesses before the Magistrate, who could speak on behalf of the prisoner, because the examination was confined to such as were witnesses for the Crown, and even then the Justices were not bound to go through the whole examination, inasmuch as they were only required to take as much evidence as they should think material to prove the felony, and certify the same to the Justices of oyer and terminer. If the prisoner had brought witnesses before the Magistrates at that time, to prove his innocence, it seems exceedingly doubtful whether the Magistrate could have sworn them, and if he could have done so, it seems still more doubtful, whether he could have received their evidence; and supposing he had certified the whole of the evidence for the prisoner, it would be no use to him afterwards upon his trial. It would result from this examination upon oath before Magistrates, that if the witnesses for the prosecution afterwards died, or were unable to appear at the trial, their depositions would probably be used as evidence. That consequence, however, would not follow in the case of witnesses for the prisoner, whose evidence could not be received upon oath, and they must have been produced again, in order

to state the facts within their knowledge at the trial. If an attorney could not at that time have claimed the right of being admitted to assist a prisoner during his examination, what authority is there for saying that the right has been since acquired? Certainly no statute law has given it, nor has any legal decision recognized it, incidentally. Had any such right ever been supposed to exist, it seems extraordinary that the attention of the Legislature should never have been called to the subject, if it were thought necessary that his presence should be allowed. Several statutes have since passed respecting prisoners charged with offences before Magistrates, and such a right has never been in the remotest degree recognized. The statute 31 *Eliz.* c. 4, An Act against the Embezzling of Armour, recognizes the right of a prisoner charged with an offence under that act, to make such lawful proof as he can by lawful witness or otherwise for his discharge and defence; but that clearly means the defence of the party upon his trial. Then follows the 4 *Jac.* 1. c. 1, which relates to the trial of felonies committed by *Englishmen* in *Scotland*. Both these statutes are commented upon by Lord Coke, in his 3d *Inst.* c. 22, p. 79; and though the latter statute speaks of witnesses to be examined on oath for the better clearing and justification of the party accused, this clearly means to refer to his trial before the Jury. Then the statute 1 *Anne*, stat. 2. c. 9, introduces a general provision for allowing the witnesses, on behalf of the prisoner, to give their evidence upon oath; but that statute speaks expressly of witnesses sworn upon the trial of the party. It seems, therefore, to be extraordinary that the attention of the Legislature having been so often drawn to the situation and circumstances of a prisoner, under accusation before Justices of Peace, and so many commentators having remarked upon these statutes, not a word is

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to be found respecting the right which is now claimed by the plaintiff. If, therefore, it be correctly assumed that the examination of a prisoner before Justices of the Peace is only an examination preparatory to trial, it then becomes a fit matter of inquiry as to what is the nature of the proceedings before the Grand Jury, to which the examination before a Magistrate is exceedingly analogous. Is there any such examination as that contended for in this case, before the Grand Jury? Is the prisoner, then charged by indictment, allowed counsel or attorney to discuss the question of his guilt or innocence? Is he allowed to examine witnesses on his behalf to prove his innocence? Certainly not. The invariable practice from the earliest time is directly the contrary. In the absence, therefore, of any authorities upon the subject, it is a fair ground of reasoning from analogy to the proceedings before a Grand Jury, that no such right ever existed, or was conceived to be compatible with the due administration of justice. The case of the Grand Jury is precisely analogous to this, and in that none of these privileges are allowed. If this be so, upon principle, what is to distinguish the one case from the other, and what sufficient reason can be urged why the same privilege should not be allowed in both? It is a hardship, or not a hardship, that the prisoner, when under examination before a Justice, should not be allowed the assistance of an attorney. What is the Magistrate to do? The law says, that the Magistrate is to act at his own discretion, and he is not to discharge the prisoner except where the accusation is totally groundless.—(*Best*, J. And even where there was no ground for charging him, it was formerly doubted whether the Justice ought not to take bail.—*Bayley*, J. The prisoner, it may be said, has a right to cross examine the witnesses brought against him.—*Abbott*, C. J. But then perhaps he wants

prompting.)—The Magistrate holds an equal hand, and examines into the nature of the accusation brought against the prisoner, sifts it to the bottom, and endeavours to ascertain whether there is sufficient ground for a commitment. In this he acts upon a sound discretion, and according to the best of his judgment. He is to judge what is, and what is not a probable cause for commitment. The Magistrate must be presumed to know his duty, and even in a case where the charge is doubtful he will adopt the same course, and it will be for him afterwards to answer for his conduct, if he acts improperly. The Magistrate knows that he acts at his peril. Supposing it to be established, that the Magistrate proceeds merely upon a *prima facie* case, and that the fact of the commitment of the prisoner produces a prejudice against him on his trial, it will be for those who contend that they have a right to this privilege, to shew that some more substantial advantage will be gained on the other side. But this case must be argued on a still broader ground, in order to entitle the plaintiff on this record to judgment. He must contend not merely that the Magistrates have a discretion whether they will or will not admit an attorney to act on behalf of a prisoner, under examination before them, but he must insist that they are *bound* to admit his presence, as matter of right, or else they subject themselves to an action. Now, on which side would the convenience or inconvenience be felt by allowing this privilege? In what state would the police of this country be, if this were law? It is not necessary to assume that an attorney would appear before a Magistrate for any improper purpose; but if an attorney is entitled to appear in the justice-room on behalf of a prisoner, the same privilege must be extended to all other persons who profess any skill in or knowledge of the law, and assume the right of assisting the prisoner in his de-

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fence. The Magistrate cannot know who is or who is not an admitted sworn attorney. He must therefore be bound to throw the door of the justice-room open to every person who chooses to call himself an attorney, and he is not competent to judge of his claim to the title. Then it follows as a consequence, that the justice-room must be considered as a Court of Justice, open to all the public. What then would be the effect if the right were conceded to that extent? And yet the plaintiff must carry the argument to that extent, and must convince the Court that the right is common to all persons before he can be entitled to judgment. In order to try the consequences which might result from such a privilege, let the case be put of a desperate gang of poachers, one of whom only is taken into custody, and brought before the Magistrate, the ends of public justice might be totally defeated by allowing the presence of a stranger during the examination of the prisoner. The attorney or any other person who assumes that character, by being allowed to hear all the evidence, might be able to put it out of the power of the Justices to arrest the other offenders. Suppose another case, certainly of not frequent occurrence, but in the investigation of which the greatest secrecy might be required, in order to attain the ends of public justice, namely, the case of high treason. One of the conspirators may be in custody, and it may be of the utmost importance that a secret examination of that person should take place; but this would be utterly defeated if the Magistrates are bound to admit every person styling himself the legal adviser of the prisoner, and claiming to be admitted in that character. Where then is the hardship of denying this privilege? The only hardship is that which necessarily results from the imperfection of human laws; to which, under all circumstances, the subjects of the kingdom must make up their

minds to submit. It must be assumed, that in nine cases out of ten the prisoners brought before Magistrates are justly suspected of the crime imputed to them—a suspicion arising either from their indiscretion, or their unequivocal acts, which admit of no doubt. It rarely happens that a perfectly innocent man is placed in such a situation. In all human probability he has been guilty of some indiscretion which subjects him to suspicion; but the Magistrate, in the honest discharge of his duty, will investigate the case, and, if he sees no pretence for the accusation, he will discharge the prisoner, or he will commit him, taking upon himself all the responsibilities of the act. But is the prisoner the only person who is to be considered in these cases; and is the Magistrate, in the proper discharge of his duty, entitled to no protection? The Magistracy of this country are surely entitled to some consideration. They come forward to do their duty in an arduous and responsible situation, unpaid and unpurchased; they gratuitously devote a great deal of their time to the service of the public; the criminal law of the country has become extremely intricate; and if they are to be perpetually exposed to captious actions for every mistake they make, the consequence will be to drive out of the commission of the peace those very persons whom it is most desirable for all parties should discharge the duties and office of a Magistrate, namely, the country gentlemen, possessing character, fortune, and property in the kingdom. On these grounds it is safest to deny this as a matter of right, and leave it to the Magistrates themselves to say in what cases they will permit the presence of an attorney, or other professional person, during their proceedings.

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Denman, C. S., in support of the replication. By the law of the land a person, under accusation for a crime

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before Justices of the Peace, has a right to have the assistance of an attorney to give him counsel and advice, with a view to his defence. [*Abbott, C. J.* Inform us what is an attorney. What part of the character and office of an attorney relates to the subject now under consideration? First define to us what is an attorney.] If this case is to be argued upon the precise legal definition of an attorney, then *cadit questio*. [*Abbott, C. J.* As applied to a Court of Justice, a person who has a right to appear for another, and to conduct his business in his absence, is what is properly called an attorney; but that is not so in criminal cases.] The argument for the plaintiff is, that the prisoner under accusation has a right to have the assistance of counsel or attorney during his examination. [*Abbott, C. J.* Then you must say that the plaintiff attends as counsel or advocate. Being in fact an attorney of this Court makes no difference in the case. If the argument applies to him, it may apply to any other person who is skilled in the law, and is competent to give legal advice and assistance to the party accused. It is not the proper business of an attorney, in his character of attorney, to attend in criminal cases before a Magistrate. Any other person equally competent to perform the same duty may have an equal right.] The case of an attorney and of counsel would stand on a different footing from that of other persons; the former is an officer of this Court, if he misbehaves himself, he is liable to the summary process, and is subject to the discretion of the Court; and therefore there is some security for his good behaviour, and the honest discharge of his duty. No such circumstances attend the situation of any other subject of the kingdom. When the question shall arise, whether a person who is not an attorney, and who does not state himself to be a professional man, well skilled in the law of the land, may claim the right

of assisting an illiterate person who may have the misfortune to labour under an unjust accusation, then it may be for the Court to inquire, upon what footing his rights are to be considered. But the case now under deliberation, is that of a party who is an officer of the Court, who is admitted to be a person capable of giving that assistance which is required by the individual accused, his client, who, under such circumstances, might be exposed to the utmost oppression, upon the very principle which it has been found necessary to argue the case on the other side. All the impressions that have taken place upon this subject have resulted from the old authorities to which reference had been had, authorities against which any lawyer at the bar, at the present day, would feel ashamed to argue. The mere statement of them to the Court is sufficient to explode them for ever. The *dictum* in *Dalton's Justice*, upon which the whole of the argument on the other side was founded, ought never again to be mentioned as an authority in a Court of Justice. In that work, p. 377, it is broadly stated, that the mere suspicion of felony, though it shall appear to the Justice that the prisoner is not guilty, binds him to commit the man for trial. Is such a doctrine as that to be endured at the present day for one moment in a Court of Justice? If it is, it must necessarily lead to the most enormous inconvenience and injustice. Such authorities may perhaps have given some colour of foundation for those impressions which have obtained with respect to the power of Magistrates, but which no state of the common law of this country ever vested in a Justice of the Peace. In the same book it is also laid down, that a person who makes a deposition, although he shall be infamous to the knowledge of the Magistrate, and though he be not a fit witness to be heard in a Court of Justice, yet shall the Justice re-

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ceive his information for the King, and bind him over to give evidence against the parties suspected; so that the party accused is not to have legal evidence against him, but the Justice is to receive such evidence for the King, as none of the King's Courts would receive in support of an accusation against any of his subjects! No such principle of law is to be found in *England*, and until some more respectable authority is quoted for such a proposition, the mere denial of the existence of any such principle is sufficient. Such questions have very seldom been brought under the consideration of Courts of Justice, and almost every thing upon it rests on *dicta* and general impressions as to the power of Magistrates expounded by such writers as *Dalton*. The opinion expressed by the Court in *Rex v. Eriswell* (a) is not unworthy of consideration; for in that case doctrines which are now universally exploded, as being utterly inconsistent with the first principles of justice, even in civil as well as criminal proceedings, were maintained by two of the most learned Judges who ever sat upon the Bench. This was the result of impressions not supported by any authority; and as those doctrines were over-ruled by *Rex v. Bilton with Harrowgate* (b) and *Rex v. Newnham Courtney* (c), so the doctrine quoted from *Dalton*, which places every man in the country at the mercy, not of the Magistrate (for he is assumed by this argument to have no discretion), but at the mercy of any corrupt and infamous individual who might think proper to make a positive oath that a felony had been committed by him, must, when examined, share the same fate. The two cases which have been cited are *Rex v. The Justices of Staffordshire*, and *Rex v. Borron*. In each the application was for a criminal information, founded upon a suggestion that the Magistrates were influenced by a corrupt

(a) 3 T. R. 707.

(b) 1 East, 13.

(c) Idem. 373.

motive. In *Rex v. The Justices of Staffordshire* the proceeding before the Magistrate was upon a conviction under the Game Laws. When that case was before this Court two of its members were absent, the Lord Chief Justice and Mr. Justice *Holroyd*. The case was not decided upon any deliberate consideration, but one of the learned Judges did undoubtedly lay it down, that a party, upon a summary conviction before a Magistrate for an offence which was to deprive him of his liberty, might be conducted without having an attorney on behalf of the defendant. It is submitted, however, in the first place, that such an expression of opinion was perfectly unnecessary in the decision of the question then immediately before the Court. That was a motion for a criminal information; and it is settled, that however erroneous or illegal the conduct of a Magistrate may be, if there is no improper or corrupt motive imputed to him, the Court will never grant the rule. It was enough in the decision of that case for the Court to say, "here is no improper motive imputable to the Magistrate, and therefore we will not grant the application;" but surely the Court will pause, when a man is to suffer penalties upon a summary conviction upon the oath of a single witness, before they lay it down as a general principle, that the party, under such circumstances, has no right to the counsel and assistance of a legal adviser. It is hardly necessary to put instances in which such a principle might operate with the most oppressive hardship and injustice. For example, suppose a case under the late Smuggling Act, 57 Geo. 3. c. 87, which subjects the offender to a penalty of 100*l.*, and renders him liable to be confined in custody for five years in his Majesty's naval service, and this too upon the adjudication of a single Magistrate, upon the oath of a single witness. Will the Court lay it down, that where

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a party is exposed to such perilous consequences, and where many important questions may possibly arise, he is to be so effected without the opportunity of being heard by some legal adviser, who may be at hand to render him his counsel and assistance? Surely the Court will pause and hesitate before they lay down such a doctrine on the authority of *Rex v. The Justices of Staffordshire*, where the suggestion of the Court was not necessary to the decision of that case. The learned Judge (*Bayley, J.*) is reported to have said, "that an attorney has no right to be present in the justice-room during the examination; his presence would only produce confusion and irregularity in the proceedings of the Magistrates." The same learned Judge said, "that perhaps counsel might have attended, though an attorney had no such right." To that it may be said, that such a privilege would, in many cases, be absolutely useless; for it might happen that counsel could not be procured. In such cases the parties offending are taken to the nearest Justice on the coasts of the kingdom, remote from such professional assistance. For instance, suppose a man charged with smuggling on the shores of *Lincolnshire*, where could he procure the aid of counsel to defend him from the penalties denounced by the act alluded to? As to the case of *Rex v. Borron*, that is inapplicable to the present question. In that case the attorney claimed the right, not merely of calling witnesses to prove certain facts in support of a prosecution for felony, but to comment upon, and to apply the law to those facts; and he called upon the Justice to refuse him this privilege at his peril, thereby endeavouring to interfere with the duties which the law had imposed upon the Justice himself. Surely that case is perfectly distinguishable from the present. This is not a ques-

tion relating to the party prosecuting, but to the party prosecuted, and the privilege now claimed under the circumstance of the particular case, is one which must be applicable to all cases of a similar nature. The right contended for in this case is, that every man under accusation before a Justice of the Peace is entitled to counsel, to assist him in the cross-examination of the witnesses who are brought against him, and of demonstrating to the Magistrate by such means, that he ought not, in the exercise of a sound judgment, to commit an innocent man for trial, and thereby subject him perhaps to many months unjust imprisonment. It seems to have been assumed on the other side, that the Magistrate has a right to exercise the power of examining the prisoner himself in secret. For this no authority can be cited. No Magistrate has a right to take a prisoner into a room by himself, and there endeavour to extract from him any facts or circumstances which may tend to his conviction. Some unquestionable authority must be adduced to establish so extraordinary a proposition. As a measure of police, indeed, the Magistrate would be justified in entering into a private examination of any person for the sake of tracing and finding a clue upon which afterwards the witnesses may be examined in a regular way, and their depositions taken down in writing; and if the depositions are to be taken in a regular way, they are to be taken in the presence of the prisoner. [*Abbott, C. J.* All previous inquiry must be extra-judicial, and only necessary to enable the Magistrate to issue his warrant.] That is the distinction contended for. When the prisoner is brought before the Magistrate, he has a right to see the witnesses whilst they are under examination, and of hearing their testimony delivered from their lips. After such examination he has a right to communicate all that has passed to his

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attorney, or other legal adviser, who may be retained for his defence, for the express purpose of meeting it by contradictory evidence. But it is also essential to justice, that he should be enabled to communicate with his legal adviser while the examination is going forward, and to avail himself of his assistance in the hour of peril and alarm, lest the agitation, which an innocent man may feel even under an unfounded charge, should betray him into imprudent expressions; and the danger of his fabricating a defence applies equally as an objection to his own undisputed privilege of being present and hearing the evidence against him. Another reason for this open inquiry into the circumstances of the case is, that no opportunity shall be afforded of bringing fabricated evidence hereafter against him in support of the charge when he is put upon his defence. The extra-judicial examination which has brought the prisoner before the Magistrate may be secret: but when he is there the proceedings become judicial. They are properly so described, because upon the decision of the Magistrate depends the liberty, perhaps the life, and certainly the character and reputation of the prisoner. That the proceedings of the Magistrates are judicial seems necessarily to result from the operation of the very statutes to which reference has been made in argument on the other side. The statute of *Philip and Mary* does not in itself make the depositions taken before the Magistrates evidence upon the trial; but from ancient times they have been admitted as evidence. The principle upon which they are admitted, is, that they are necessarily taken in the presence of the prisoner himself; he has the opportunity of hearing them, and the right of cross-examining the witnesses at the time they give their depositions. The words of the statute of *Philip and Mary* imply the presence of the prisoner, before the Justice, during the exa-

mination of the witnesses; for it enacts, "that when any prisoner is *brought before* him on a charge of felony, he shall take the examination of the prisoner, and the information of *those who bring him*, of the fact and circumstances thereof, and he is to put the same, or as much thereof as shall be material to prove the felony, into writing." This enactment is most certainly inconsistent with a secret examination. The prisoner is not to be induced to confess his crime, nor to be sifted of facts which may afterwards become evidence against him. He is present for the express purpose of cross-examination,—a real and effective cross-examination, such as a skilful adviser may conduct or suggest; not such an ignorant course of proceeding as may ensnare and tend to convict him. All that the statute requires is, that the Magistrate shall take in writing the fact and circumstances of the case, or as much thereof as shall be material to prove the felony; that is, to prove the circumstances of the case, and to prove that there is enough to found the warrant of commitment; but he is not arbitrarily to follow the directions of *Dalton*, and to commit the party for trial, though he is perfectly satisfied of his innocence. The passage which has been cited from *Hawkins P. C. c. 15. s. 1.* assumes this right in the Magistrate, of exercising his own judgment upon the case; for he says, "wherever a person is brought before a Justice of Peace upon an accusation of treason or felony, he must be either bailed or committed, unless it manifestly appear that no such crime was committed, or that the cause for which alone the party was suspected was totally groundless." Putting the present case upon that proposition, it must become a question before the Justice, whether the charge does or does not amount to a felony. It may then become competent for the prisoner to shew that there is no just ground in

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point of law for the charge of felony, and that there is no cause of suspecting him of such a crime; but how is a poor ignorant man, who is perhaps subjected to the malicious charge of an enemy, to be able to avail himself of that advantage, unless he has the aid of a legal adviser, capable of assisting him in discussing the question before the Justice? Surely in such a case he is entitled to the assistance of a person skilled in the law. [*Bayley, J.* Or else you must have a Magistrate who knows his duty, and can discriminate what is and what is not felony.] A Magistrate, in the honest discharge of his duty, may make a very gross mistake in point of law. His duty does not require him to decide finally upon the guilt or innocence of the party, but he is to be satisfied upon the evidence in point of law, that a felony has been committed. For this purpose, he may require witnesses to be examined for the prisoner as well as for the prosecution, in order to satisfy his mind that the facts amount to a felony. In this very case that was the object of the Magistrates, for they discharged the prisoner for the purpose of allowing him an opportunity of bringing his witnesses on a day specified, in order to shew that no felony had been committed by him; and then it was that the plaintiff on this record, attended for the purpose of laying the evidence of those witnesses before the Magistrates. It is not necessary in the present case to contend, that the plaintiff would have been at liberty to make any statement by way of argument before the Magistrates, or even to examine the witnesses, but it is contended, that he is at liberty to suggest to the party under accusation what may be fit or proper to be done in order to induce the Magistrates to order his discharge. With respect to the distinction between the attorney and a counsellor, there is a case in *Skinner*, in which the distinction is denied. In that case there was

a covenant for executing such conveyances and assurances as the counsel should advise and require. An attorney only was consulted, and the Court held that sufficient to satisfy the words of the covenant. There is no magic in the word "*counsel*." The attorney is the only counsel that can be procured in remote parts of the country. In *London*, undoubtedly, counsel may be obtained at any time, because they are on the spot, in attendance upon the Courts of the metropolis, without any of the inconveniences apprehended, but that is not so in the country, and, therefore, a prisoner in such a situation, is obliged to procure the best counsel he can, namely, an attorney, who, from his knowledge of, and experience in the law, may be of service to him during his examination. In the case alluded to, the Court drew a distinction between an attorney and other persons not in the profession, for they said, that if it had been a physician, or a clergyman, that would not do, but an attorney has law enough in him to give counsel if the party chooses to abide by it. The defence of prisoners at all the Quarter Sessions throughout the country was, within these few years, exclusively confided to attornies; it is still so in many places. These examinations which take place before Magistrates are actual evidence against the prisoner on his trial, in case of the death of the witnesses, or their inability to travel to the Assizes. Is it to be said then, that a prisoner is to be affected, perhaps in his life, by the depositions given against him before a Magistrate, unless he has the opportunity of cross-examining the witnesses with the aid of legal advice, when they give their depositions, those depositions being afterwards receivable as evidence against him in the cases mentioned? In a case which recently occurred at *Leicester*, where two individuals were charged with a murder, and the alleged guilt of the prisoners, depending very much upon the deposition of the deceased,

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the learned Judge was of opinion, that as the Magistrates' clerk did not take the deposition with perfect accuracy, it was not receivable in evidence. [*Best, J.* I would not receive the examination in evidence, because it was not taken in the words of the witness.] That recognizes the distinction which is to be drawn in these cases, namely, that the examination cannot be taken unless in the presence of the prisoner, in order that he may hear what is said, and have an opportunity of cross-examining the witness. [*Best, J.* In the case you allude to, it was the declaration of a dying man.] But the principle would be just the same. It has been doubted by a very learned Judge (*Chambre, J.*) whether the mere reading over the depositions which have been taken, to a prisoner, when they were not taken in his presence, would be sufficient. That doubt, however, has been removed by the decision of a leading case, and it has been held, that the reading over the depositions to the prisoner is equivalent to an examination in his presence. [*Bayley, J.* The witnesses being present at the time, so that if the prisoner wished to put any question upon the examinations, he might have an opportunity of cross-examination.] But suppose the prisoner charged, has not the human voice,—is deaf and dumb, or suppose the case of a foreigner, who is utterly ignorant of the *English* language, or suppose, as in this very case (for the demurrer has admitted it), this man is so ignorant and illiterate, as to be unable to protect himself from the consequences of the accusation, and cannot avail himself of the opportunity of cross-examination, of what advantage would the privilege be to him without legal advice? [*Bayley, J.* He may suggest any question he may think proper to the Magistrate, who will put it for him.] It is to guard the prisoner against the consequences of his own ignorance, that legal advice in such a situation becomes necessary.

When he is attended by an attorney, the latter receives his confidential communications as to the real state of the facts, and the attorney deals with those facts according to the principles of law; and if in his judgment and experience, he thinks the prisoner ought to remain silent, and reserve his defence until the day of trial, he will so advise him. [*Bayley, J.* I have no doubt that a prisoner against whom a charge is brought, may suggest to the Magistrate any question in the cross-examination of the witnesses, which he thinks will be of benefit to him.] Such a privilege, perhaps, might operate in the case of an ignorant and illiterate man, to his prejudice. The argument urged to the Court is, that the prisoner is entitled to have his attorney in attendance upon him, in order that he may have the benefit of his counsel and advice as to the course proper to pursue. An illiterate man, unprotected by legal assistance, may imprudently suggest a question to the Magistrate, which may turn the balance against him, and the prejudice resulting from his indiscretion, may strongly operate to his disadvantage when he comes to the trial. In the very beginning of a prosecution against a prisoner, there seems no good reason why he should not have the same protection which the law allows him on his trial. In a Court of Justice, the prisoner has an undoubted right to have the assistance of counsel and attorney in conducting his defence. The utmost skill and ingenuity may be necessary to demonstrate innocence, and rebut a false charge; and if he be an innocent man, he ought, *in limine*, to have the same sort of assistance, in order to avert that unmerited punishment to which, perhaps, the injudicious and erroneous commitment of the Magistrate may subject him. It has been assumed, that the case of the Coroner is distinguishable from that of the Magistrate, but that is not so. The duties of each are in principle the same.

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The duty of the Coroner is to inquire whether *A.*, *B.*, or *C.*, or any body, has been guilty of a particular offence against a particular individual. On such an inquisition there seems to be no doubt that counsel might attend on behalf of the party likely to be affected by the proceedings. The Coroner's is an inquest of office, and if counsel may attend before the inquisition, there is no good reason why the same privilege should not be extended to a case before Magistrates. [*Bayley, J.* The Coroners' Inquest is in the nature of a Grand Jury; it is impaneled for the specific purpose of ascertaining the particular cause of the death of the deceased, and this is to be done on view of the body. *Best, J.* The Coroners' Inquest makes a presentment, upon which the Justices of gaol delivery will afterwards act judicially. The inquisition is equivalent to the finding of a Grand Jury.] In the case where the deceased is supposed to be *felo de se*, there can be no doubt that the representatives of the deceased may attend by counsel, in order to avert the consequences of such a finding by the inquest. If counsel then have a right to attend before the Coroner on behalf of persons remotely interested, *à fortiori* he has a right to attend before the Magistrates for the protection of the party brought into jeopardy by the accusation.

*Adolphus, amicus curiæ*, referred to *Barclay's case (a)*, as an authority to shew, that the Coroner is to hear the evidence on both sides on an inquisition *super visum corporis*. He mentioned, that on a recent occasion (*b*) he had looked into the authorities, as to the right of counsel to attend before a Coroner's Inquest, and that he had in fact himself attended several successive days as Counsel upon the inquisition alluded to.

(a) 2 Sid. 90.

his life on the occasion of Queen

(b) Inquest upon the body of *Caroline's* funeral in 1821.  
a person named *Honey*, who lost

*Denman, C. S.*—In order to support the argument on the other side, it was found necessary to resort to old *dicta* of doubtful authority, in order to support an argument, which is in opposition to every sound principle of justice, good sense, and humanity. In no book of authority can any thing be found which militates against the privilege now claimed. It has been the general practice on almost all occasions, at least tacitly, to acquiesce in the right of a counsel or attorney to attend the examination of a prisoner before Magistrates. Before the Coroner, the right undoubtedly exists, and it would be contrary to the spirit of justice if it were denied. Amongst other duties of the Coroner's Inquest, they are to find whether the party supposed to have caused the death of the deceased, has or has not fled; and that question is always put to the jury, and if the Coroner did not do so, he would be finable. Upon an issue of that kind, therefore, there can be no doubt that counsel would have a right to attend on behalf of the party. [*Bayley, J.* This distinction is to be taken in the case of the Coroner's inquisition; if the inquest is traversable, then there appears to be no right to have counsel, but if it is conclusive, the party has a right, before he is concluded, to have his counsel attending on his behalf.] Then the same principle would apply to proceedings before Justices, under penal statutes, which are conclusive, where no appeal to the Sessions is given; but in the case of *Rex v. The Justices of Staffordshire*, it was distinctly laid down, that even in proceedings under penal statutes, an attorney has no right to be present in the justice-room. [*Bayley, J.* That case is not to be considered as the solemn decision of the Court. The opinion there expressed, upon this point, was merely the *obiter dictum* of a single Judge, to which I pay no respect. *Abbott, C. J.* An observation thrown out by a Judge

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merely in the course of argument, is not to be considered as conclusive of the case, and ought not to be urged as a solemn decision.] But it is on that *dictum* that the defendant's argument depends. [*Best, J.* When a man is put upon his trial, the practice is first to inquire whether the prisoner be guilty or not guilty, and then if he be found guilty, to inquire whether he had fled. *Abbott, C. J.* That was always done upon the first arraignment before the Jury. The Clerk of Arraignment first charged the Jury to inquire whether the prisoner was guilty or not guilty; and second, whether he had fled. *Bayley, J.* That was the invariable practice on the Western Circuit, and used to be such on the Midland Circuit.] The nature of the proceedings in this particular case shews, that there was to be an hearing judicially before the Magistrates. They were to decide whether or not the case amounted to a felony, and for that purpose they required witnesses to be examined on both sides. It is said to have been doubtful, whether, before the statute of *Anne, c. 9*, any witness for the prisoner, even upon his trial, could be examined, though *Lord Coke (a)* did not entertain any. In consequence, however, of early impressions, an Act of Parliament was deemed necessary, to enable the prisoner to have witnesses sworn in his behalf, even in a case of life and death. In this particular case the party is brought before the Justices on a charge of felony, and the Magistrates themselves appoint a day on which he is to appear with his witnesses to prove his innocence. The time is prefixed for that purpose; and the question is, whether the witnesses are to attend under circumstances which might make their examination completely unavailing. [*Abbott, C. J.* In this case it does not appear from the pleadings, that the plaintiff was to be present for the purpose of cross-examining the wit-

(a) 3 Inst. 79.

nesses for the prosecution, but to conduct the examination of the prisoner's witnesses.] He was to do both; for the plaintiff's replication says, "that he was retained by the prisoner to assist him with his counsel, skill, suggestions, and advice, in making his the said *George Brown*'s defence before the said defendants as such Justices." This imports that the plaintiff was not merely to assist in cross-examining the prosecutor's witnesses, but also in examining such witnesses as would prove the prisoner's entire innocence. It does not appear that the prosecutor was to attend. [*Abbott*, C. J. There might have been some examination of the prosecutor's witnesses before the warrant was granted. *Bayley*, J. What power has the Magistrate to examine the prisoner's witnesses on oath?] There seems to be no doubt that he has such a power. [*Bayley*, J. If he had such a power before the statute of *Anne*, then there would be this anomaly—the Magistrate might examine the witnesses for the prisoner on oath, but when the prisoner came to take his trial, they could not be examined on oath. There is no provision in the statute of *Anne* which says any thing as to the examination of the prisoner's witnesses on oath before the Magistrates. By sec. 3. of that statute it is enacted, "that from and after the 12th *February*, 1702, all and every person or persons who shall be produced or appear as a witness or witnesses, on the behalf of the prisoner, upon any trial for treason or felony, before he or she be admitted to depose or give any manner of evidence, shall first take an oath to depose to the truth, the whole truth, and nothing but the truth, in such manner as the witnesses for the Queen are obliged to do." This statute clearly refers only to the witnesses called for the prisoner on his trial. *Abbott*, C. J. I think it will be found that the prosecutor and his witnesses only are to be examined on oath, and they are the persons who are

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bound over to give evidence at the trial. In the defendant's plea nothing is said about the adjournment of the examination to a future day, in order to give the prisoner an opportunity of producing his witnesses. The plea alleges, "that the Justices were assembled for the purpose of taking the information upon oath, touching and concerning a certain felony, with which the said *George Brown* was charged, and then in custody." According to this, they were merely to examine the witnesses which should be produced touching the charge, and therefore it is assuming something to say, that the witnesses, who were to be afterwards called, were essential to the prisoner's defence.] On the other side certain statutes have been adverted to, with a view of shewing that the defendants were justified in their conduct towards the plaintiff; but those statutes (1 *Rich.* 3. c. 3. and 1 & 2 *Phil. & M.* c. 13.) evidently shew that the examination of the prisoner must be public. Supposing then the Magistrate chooses to institute a private examination, and say, "I, in the exercise of my authority, choose this should be a private examination, and I won't permit you, the attorney, to attend," could the attorney be treated as a trespasser in going into the Justice's room in the exercise of that right, which *primâ facie* belongs to all parties? At all events, if this right of private examination exists, would not the plaintiff have been entitled to notice from the Justices that they were conducting a private examination? Here there was no notice of that kind given or stated, and therefore the forcible ejection of the plaintiff could not be justified. If it should be said, as sometimes it has been, that such persons have no right to obtrude into the Justice's parlour, to that it is answered, that the Justices are not bound to examine the prisoner in their own private parlour, but are required to transact the business of their

office in the public justice room. [*Abbott, C.J.* It is very often convenient that the examination of the prisoner should be private, and such a mode of proceeding is frequently beneficial to the prisoner himself; for if he be an innocent man, he is not subjected to public exposure; and if upon such examination the Magistrate finds there is no foundation for the charge, he is immediately liberated, without any taint on his character.] If in this case the plaintiff had had notice that the examination was to be private, then he would take the peril of the intrusion upon himself; but as no such notice was given, he merely exercises his right as an attorney, of entering the justice room, which is *prima facie* an open Court. [*Abbott, C.J.* The law would be the same, whether the Justice sat in a private room, or in his public office. If the right claimed by the plaintiff is lawful, it is an universal right.] There is a second point raised upon these pleadings, namely, supposing the plaintiff had a right to be present to give his legal assistance to the prisoner, still, whether such a right would justify him in breaking and entering the justice room, to assert the right of a third person. It is difficult to conceive how this can be said to be the right of a third person, and not of the attorney himself. Unless it is his own right, which he enjoys in common with the rest of the public, he could not assert it as the right of a third person. The right is claimed on a much broader ground, and it must be claimed at once as a public right. [*Bayley, J.* That would make the Magistrate's room a public Court of Justice, and consequently all persons would have a right to enter.] The proceedings in this particular case were not secret. There were a great number of poor persons present who had nothing to do with the proceedings immediately before the Justices, and the

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plaintiff being the only attorney in the room, he is selected for this forcible expulsion. He, therefore, had no other course to adopt but to endeavour to assert his right, or acquiesce in the assumed authority of the Justices. [Abbott, C. J. If you put the case upon the ground that other persons were there, you must shew that they were there lawfully.] If an attorney is retained to attend the examination of a prisoner on a charge of murder, for example, he is to make his way into the justice room in the best way he can, and exercise his right with as much firmness as is necessary. It is his bounden duty to take care and attend to the instructions of his client; and even upon the ground of the *jus tertii* he would be justified in so acting. That is precisely the present case; the plaintiff is retained on behalf of a prisoner to attend his examination. Acting upon that retainer, he peaceably, but firmly, asserts that right. He does not commit a trespass in the first instance, but the trespass is committed upon him, in the assertion of his right to be present at the examination. It is not necessary in the present case to contend, that the Magistrates are bound to admit every body; but in answer to this action they must shew that they have a right, not merely to exclude the plaintiff, but every body else. These are the topics upon which the plaintiff rests his case. It is submitted, under the statute 1 & 2 *Phil. & M.*, and considering the practice which has uniformly prevailed under that statute, and, consistently with the first principles of justice, that an attorney has a right to be present at the examination of a prisoner charged with felony, and that this right belongs to him in his professional character, whatever may be the case, where the party claiming the right is an ignorant, illiterate, and incompetent person.

Coleridge, in reply, was stopped by the Court.

· ABBOTT, C.J.—If I thought our decision in favor of the present defendants would be productive of any inconvenience in the general administration of justice, or would in general tend to the abridgment of the liberty of the subject, which may be considered as the greatest of all inconveniences in the administration of justice, I should pause before I pronounced my judgment. Being perfectly convinced that such a decision can have no such effect, and thinking, on the contrary, that considering the matter in an enlarged view, it is more beneficial to the subject, that these examinations should be conducted without the presence of attorneys than with them, I do not see any reason why I should postpone for any time, the delivering of that opinion which I have formed. The plaintiff cannot succeed in this action unless he can establish, that every person who is brought before the Magistrates, charged with felony or other crime, (and I cannot distinguish between one and the other) has a right upon such examination to have the presence and assistance of some person who, by his profession and education, may be skilled in the law. An attorney certainly has no right to give his attendance on such an occasion, inasmuch as it is not the proper duty of an attorney, as such, so to act; for it is merely in the absence of the party that he is to appear, and not when the party is himself personally present. If he is to appear on the behalf of the party in his presence, then he attends as his counsel and advocate. Now if there be any such right, one should have expected to find it recognized in some book of authority; but undoubtedly there is no book in which it is in any way recognized. In practice, Justices do on many occasions permit the presence of persons learned in the law. They do so very often, and there are cases in which it may be convenient for them so to do. Where doubts and difficulties present them-

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selves, or are likely to present themselves in the course of an examination of a prisoner, it may be fitting that they should have the benefit of the assistance of other persons skilled in the law; though, we must assume, that the Justices themselves are by no means ignorant of the law or unqualified to discharge their duty; and whenever those cases do occur, I believe it is found that the Magistrates are not only willing to have such assistance, but are often desirous of the presence of professional men. It by no means follows, however, as a consequence, that the admission of this class of persons to be present on some occasions would confer a right to be present on all; and the case on the part of the plaintiff cannot be sustained, without shewing that they have a right to be present on all. Indeed it is impossible to distinguish between the case of one, and several persons, because, if one has a right to be present at the examination of a prisoner, many may insist upon the same right. I cannot distinguish between the case of this particular individual, and that of any other person. If the attorney has a right to be present, he may obtain such information as may tend to frustrate the administration of justice, by knowing who the persons are who are likely to be accused; for if but one only of several persons implicated in the crime happens to be in custody, by this means the others may be got out of the way, and escape detection. There would therefore be great inconvenience in establishing such a right on all hands, and on all occasions. But if there be a right in the party accused to have the presence of some legal person on his behalf, it seems to me to be impossible to say, that the party who prefers the prosecution has not an equal right to have the presence and assistance of some legal person on his behalf. The consequence of having persons on each side, of that description, would, in many cases, lead to great

inconvenience, and certainly to great expense. That alone is a reason why it should not be allowed; but, in many cases, it would be highly prejudicial to the prisoner under examination, because it is much more likely that the prosecutor should be able to have the presence of legal advisers, than the party who is accused. That is more likely to happen in the one case than in the other. On the other hand, if the privilege is to be confined to the prisoner, which, it is supposed, would have an influence with the Magistrate in his favor, it seems to me that the Magistrate would be as likely to commit, or be as ready to discharge the party, as he would in any case where he was allowed to exercise his own judgment and discretion. The same consequences therefore, would be just as likely to follow in the one case, as in the other. What is the nature of the inquiry at which, the plaintiff now insists upon his right to be present? It is not a trial; the Magistrates are not assembled in any thing, which can be properly called a Court. The proceedings on the part of the Magistrates are merely preliminary, in order to ascertain whether there is sufficient ground to commit the party for trial by the country. Before the Grand Jury also the proceedings are preliminary. If the party accused has a right to have the assistance of some person on his behalf at the first preliminary inquiry, it would be exceedingly unjust to say, that he has not an equal right to have the like assistance on the second; and I find it very difficult to distinguish between the one and the other, in the consideration of this question. Being only a preliminary investigation of the case in both instances, it seems to me, that they are both to be governed by the same rule. This is the case of a man who, in his examination before Justices, desires to have the presence of some person who is not allowed to examine the witnesses with his own lips, but

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who shall be able to instruct the prisoner how to do so, and to give him advice and assistance in the course he is to adopt. That is a very different thing from having the presence of such a person on the trial of the party accused. It seems to me, that the acknowledgment of such a right (and in the very first instance this is claimed as a right) would, in many cases, occasion the greatest possible inconvenience; the inconveniences even, with respect to personal liberty, would be greater than those which now exist. I think it is much better and safer to leave it to the discretion of the Justices whether, upon occasions like the present, a legal adviser, on behalf of the party accused, shall enter their room to hear their proceedings, and give such assistance as he can to his client during the investigation of the case. It is much better to leave it to the discretion of the Justices than to say that he shall, in all cases, be bound to admit every person who introduces himself as the legal adviser of the prisoner. I think there is no authority in favor of the right now claimed. The plaintiff rests his case upon the trial of a right, and thinking that this will be the establishing of the right in all cases, I am of opinion we ought not to do that which must be productive of so many inconveniences.

BAYLEY, J.—I am of the same opinion. This is not a question upon a summary conviction, and not any question where the decision of the Magistrates will be conclusive against the party; and whenever a question of that kind shall arise, I hope I shall not be bound conclusively by any *obiter dictum* which may have fallen from me in *Rex v. The Justices of Staffordshire*. Whenever that point shall be distinctly raised, my mind will be open upon it, and I shall be ready to hear it discussed on the one side and the other, and give

my opinion upon deliberate consideration. This is not a question whether the Magistrates are to exercise a discretion, whether an attorney shall or shall not be admitted into their room. The question here is, whether the person against whom the charge is made, has a right to insist that he shall have a person present in order to give him legal advice and assistance. I do not found my opinion upon any distinction between attorney and counsel, but I form it upon the principle that upon the examination before the Magistrates on a charge of felony, the party accused has no right to insist upon having the presence of a legal adviser as a matter of right. My opinion is, that neither the prisoner on the one hand, nor the prosecutor by whom the charge is made, on the other, has any right to have a legal adviser present; and in giving this opinion, I have had in view the provisions of the statute 1 & 2 P. & M. c. 13. s. 4. That statute points out in explicit terms the duties which the Magistrates are called upon to discharge. They are "to take the examination of the prisoner, and the information of those persons who bring him before them, on the charge of felony; and the fact and circumstances thereof, or as much thereof as shall be material to prove the felony, shall be put in writing." I am by no means satisfied with those authorities which have been relied upon by the counsel for the defendants. I differ from those authorities which say that the Magistrate has no discretion, and that he is not to judge of the probability of the case, and of the credit of the witnesses who are brought before him to support a charge of felony. I think the Magistrate has a right to exercise his own discretion in such cases, and that he is bound to do it, and he ought not, as it seems to me, to commit the party, unless he thinks there is a *prima facie* case made out by witnesses whom he may think entitled to a reasonable degree of credit. But when that

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is the case, it is his duty to commit. The Magistrate is generally a man of good education, and who, to a certain degree, possesses legal notions, and he is bound to act impartially between the prosecutor on the one hand, and the prisoner charged on the other. If the person charged is really innocent, he would be competent, however ignorant, to suggest to the Magistrate such topics as he thought would be of advantage to him, in order that the Magistrate might sift the story to the bottom; and the Magistrate, standing indifferent between the one side and the other, is the only legal adviser which the party has a right to insist shall be present at the time of the inquiry. There are many instances in which, in the exercise of a just discretion, the Magistrate would give to the party the privilege of having a professional person present on his behalf; but still I should say that that was a privilege only, and not a right, and that the Magistrate is to exercise his own discretion upon the subject. No person has a right to say, against the will of the Magistrate, "I shall force myself upon you; for I have a right to conduct the case, on the part of the prisoner, against whom the charge is made." I think there is, to a certain degree, an analogy between the inquiry before the Magistrate, and that before the Grand Jury. The Grand Jury hears a case *ex parte*, and *ex parte* only, and though it may be said to be extremely hard, that a person should be deprived of his liberty merely upon an inquiry before Magistrates, where he alone is present to examine the witnesses brought forward against him, and where he has not the advantage of legal assistance, yet the case, when it is brought before the Grand Jury, is, with respect to him, still harder, because there the evidence is given in his absence; he can have no witness or person attending on his behalf to avert the finding of the bill of indictment by the Grand Jury, which is to be the foundation of his subsequent trial.



There he is absolutely defenceless, and has no opportunity whatever of being heard by counsel or attorney. There is no authority which says that the party against whom the charge is made has the right which is now claimed. I believe this is the first instance in which the right was ever claimed, and when we look back to the statute of *Phil. & M.*, under which the Magistrate now acts, and considering how the law stood at that period of time, at least as far as respects the witnesses adduced on the part of the prisoner, it cannot be supposed, that at that period the party had a right to have an attorney present attending on his behalf to examine the witnesses. But it may be considered, that that is not a fair mode of putting the question, because at that time, however beneficial it might have been to the party to have some person present to cross-examine the witnesses for the prosecution, and adduce evidence on his own behalf, still the right did not then exist. Therefore I shall not found my opinion upon the circumstance, that at the period when the statute of *Phil. & M.* passed, the party had no right to have witnesses examined on his behalf. I put the case on the broad ground, that it is entirely in the discretion of the Magistrates whether they will or will not admit any person besides the witnesses for the prosecution and the person charged, and it being matter of discretion in him, the person against whom the charge is made is not entitled to claim as matter of right, to have an attorney present.

HOLROYD, J.—I am of the same opinion. I think the right claimed in the present case, namely, for an attorney of this Court to act upon the retainer of a person charged with felony before Magistrates—not only to give his advice to the party charged, but to examine the witnesses adduced on his behalf, and also to cross-examine the witnesses for the prosecution, cannot be legally sup-

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ported. I mean, it cannot be supported as a matter of abstract positive right. The Magistrate, in the discharge of his office, appears to me not to be acting as a Judge in a Court of Justice. His authority is to inquire, and he is necessarily invested by law with power for that purpose, and the law presumes *primâ facie* that the Magistrate, who is appointed, is properly qualified for the administration of the law. It is to be presumed *primâ facie* that the Magistrates will do their duty faithfully and honestly, and if they do not, they are punishable. The law intrusts the Magistrates with, and confers upon them, the power of investigating and of inquiring whether there be sufficient ground to commit the party accused, so that there shall be further inquiry into the charge made against him. The law gives the power to him to do that, and not to any other person, whom the prisoner charged, thinks fit to bring with him for the purpose of examining the witnesses. I apprehend the claim which is at present made, goes to the extent that the prisoner who is charged, might have any person whom he supposed skilled in the law to act for him; because, though the person claiming on this record is claiming as an attorney of this Court, yet the proper province of an attorney does not go to the examination of witnesses, nor to an interference in the investigation of the charge, itself. The province of an attorney, is no more than to be put in the place of the principal; that is, to act for him in the suit in which his principal is engaged. By the common law the party was not entitled to appear by attorney, unless his personal attendance was dispensed with under the special circumstances of the case, and then it was by writ out of Chancery. Formerly attornies were never admitted to appear for the party himself in the first instance, and whenever the defendant or the plaintiff could appear in person, he was not at liberty to



appear to or bring in action by attorney. Lord Coke (a) lays this down broadly, and he mentions a case where an appeal of mayhem was brought, in which the plaintiff appeared by attorney, and declared against the defendant, "who prayed that the plaintiff might be remanded, for that he could not appear by attorney, and if the plaintiff appeared not, that he might be nonsuited; against which the counsel of the plaintiff objected, that the plaintiff in appeal of mayhem might appear by attorney; for that it might be, that he was so wounded as he could not appear, and for authority cited 21 *Hen. 7*; to which answer was made by the counsel for the defendant, and resolved by the whole Court, that the plaintiff could not appear by attorney; for the defendant may demand oyer of the main, &c. which shall be peremptory to him, being a trial of the mayhem, which is a trial which the law giveth him." I mention this merely for the purpose of shewing, that the fact of the plaintiff being an attorney, considered with reference to the province and duties of an attorney, makes no difference in this case, so as to narrow the claim of the party, if he be entitled to have any person present assisting him in his examination. The business of the attorney is only to appear for a party, and act for him in his absence, and he is put exactly in the place of his client; but that is not so upon an inquiry where the principal is necessarily present, and in such a case the attorney has no right to interfere in the administration of justice; which in that case is committed to the Magistrate only. It is no more his duty as an attorney to do that, than it is the duty of any other who may be supposed to be skilled in the law. Neither is there any authority to be found in the law, nor is it agreeable to the practice, as received or understood, that persons who are charged with a crime have a right to legal advice and assistance, when the duty is thrown

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(a) 2 Inst. c. 8. p. 513.

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upon the Magistrate of inquiring whether there is sufficient in the case, on the oath of the witnesses, to justify him in saying that there shall be a further inquiry into the charge. This is the duty of the Magistrates, and no one attending on behalf of the prisoner, has a right to interfere with that duty. It is very convenient and very advisable on many occasions when doubts arise, that the Magistrate should have the assistance of a person skilled in the law, to give him information, if it is required, and whenever such occasions arise, the Magistrate, in the anxious discharge of his duty, will require such assistance in the first instance, lest any mistake should be made disadvantageous to the party accused. But that does not go to establish that the party has a right to have any person brought forward to assist the Magistrate in the execution of his duty. It is entirely a matter in the Magistrate's discretion; for when a sufficient ground is established upon evidence to justify the commitment, the Magistrate sends the matter for further inquiry. I think the prisoner who is charged has no ground as a matter of right to insist that any person shall attend on his behalf during the inquiry.

BEST, J.—I also am of the same opinion. In this particular case the party is brought before the Justices on a charge of felony, and the Justices very properly institute an inquiry whether there are sufficient grounds to commit him for trial. It is asked, in this case, whether the party is not at least entitled to counsel and advice during his examination? I should be sorry to pronounce that in no case should the party have the benefit of counsel; but it is much better that there should be some hardship suffered in the individual case, than that the public should sustain great detriment, by the recognition of this as a general right; for I have no doubt, that if the right here contended for is conceded, the public will sustain

considerable prejudice. It is not left to the discretion of the Magistrates whether they will or will not admit the attorney into their room. The plaintiff says he has a right to be present at the examination of the prisoner. He has no such right by any law with which I am acquainted, nor can he be present at any private examination; for if the attorney has a right to be present, there will be an end to the utility of such examinations. It must occur to every body at all acquainted with the administration of justice, that private examinations are often necessary to the ends of justice. Suppose the case which had been just put by the defendant's counsel in argument, where one of a gang of poachers is taken up; if the attorney is to be present at the examination of that individual, he may convey such information to the other parties as will prevent their apprehension. Again, suppose the case of stolen goods, which are concealed, may not the attorney, if he is allowed to be present at the examination, communicate information by which those goods may be removed, and thereby destroy the evidence which the finding of them in the place of concealment, would afford, in order to make out the case against the prisoner? It is said by the plaintiff's counsel, that as the prisoner himself must be present at the examination, he might make his communication afterwards to his attorney, and thereby effect the same object as well as if the attorney himself were present. But the Magistrate, if thinks proper, may take care that no such communication shall take place; he may cut off any intercourse with the prisoner which is likely to interrupt the investigation of truth, and prevent the detection of crime. I think that arguments of convenience or inconvenience, have little to do with the present question. We must decide according to the law as we find it. If the law, as it stands, is productive of inconvenience, it is not for us to correct it; it is for the Legislature to give us a new

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rule; we are only to inquire what the law is at present. It is insisted that the inquiry before the Justices is a judicial inquiry. If it is, undoubtedly it is open to all parties, and all persons have a right to be present, and if properly authorized may do what they think proper in order to assist the Magistrates in forming their judgment. But there is no authority whatever upon which it is possible to argue that there is a judicial inquiry. It is nothing like a judicial inquiry, and it will not be found upon an examination of the law, that the Magistrate is finally to decide upon the guilt or innocence of the party accused; but that he is merely to ascertain whether there is sufficient ground to deprive him of his liberty; whether he is to be committed for trial or discharged altogether. With the passage referred to in *Dalton's Justice* I do not agree, and I am warranted in saying, that that cannot be law by the observation quoted from 2 *Hawkins' P. C.* c. 15. p. 140; because, according to that passage, the Magistrate has a right and ought to discharge the prisoner, if it manifestly appears that no crime was committed, or that the cause for which alone the party was suspected was totally groundless. But in order to ascertain whether there is any ground for the charge, the Justices must enter into an examination of the witnesses on both sides. The meaning of that is this; if he finds that the evidence, on the part of the prosecution, establishes nothing like a *prima facie* case, then it is his duty to discharge the prisoner. That book supplies us with very little information as to what was the practice in the examination by Justices before the statute of 1 & 2 *P. & M.* The only passage that I can find upon this subject is in *Dalton*, c. 165. p. 381, and I think this must be taken to be the law. He says, "it seemeth just and right that the Justices of Peace, who take information against a felon or person suspected of felony should

take and certify, as well such information, proof, and evidence, as goeth to the acquittal or clearing of the prisoner, as such as makes against the prisoner; for such information, evidence, or proof taken, and the certifying thereof, by the Justice of Peace, is only to inform the King, and his Justices of gaol delivery, of the truth of the matter." It is not to be taken therefore, that he is to decide upon the matter judicially, but he is to take the informations whether they go to the acquittal or conviction of the prisoner, and to transmit them to the Justices of gaol delivery, in order that they may decide upon the matter; and that law is confirmed by the statute of 1 & 2 P. & M. For what purpose was that statute passed? It was not passed to give the Justices or Coroners authority judicially to decide upon the cases brought before them, but for the purpose of correcting those abuses which had grown out of the previous statute, 1 Ric. 3. referred to in the argument. By that statute, the Magistrates were authorized to discharge the prisoner upon bail. The Magistrates, it seems, abused the authority which that statute gave them, and had discharged persons upon bail who ought not to have been discharged; and therefore the stat. 3 Hen. 7. c. 3. was passed to restrain the authority of the Magistrates. By the first-mentioned statute every Magistrate was allowed to discharge persons at his discretion, to be on bail where they were only suspected of felony, whereby many offenders had escaped justice; and by the second, farther provisions were made for restraining the abuses which had grown up; but it being found that the statute Hen. 7. had not that effect, the 1 & 2 P. & M. was passed; not to give any judicial authority to the Justices to inquire into, and determine the cases brought before them, but to prevent the abuses which had existed under the preceding statutes. By 1 & 2 P. & M. the Justices, before they admit the party to bail, shall take the examination of the

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prisoner and the information of those who bring him, of the fact and circumstances of the felony, and the same or as much as shall be material to prove the felony, shall be put in writing before they make bailment. Why are they to take the examination? Why, in order that it may be seen whether they have abused their authority,—whether they ought to have bailed the party; and for this purpose the examinations are to be transmitted to the assizes; and it being found convenient that the Justices should have authority to take the examinations in all cases, the statute 2 & 3 *P. & M.* c. 10. was passed, which did that which the statute 1 & 2 *P. & M.* did not do, namely, direct the examination to be taken in suspicion of cases of felony only; to remedy which it was enacted, that the examinations should be taken in both cases and transmitted to the assizes. That shews most clearly, that the object of these statutes was not to give the Justices judicial power to decide upon the subject, but to enable the Judge at the assizes to see whether the Justices had exercised proper authority in admitting the party to bail. That was the utmost extent of the view of the Legislature in passing the first-mentioned act; but that act not having gone far enough, the second was passed, so as to make it imperative upon the Justices to take the examinations in all cases whether the party was specifically charged with or only suspected of felony, and transmit the same to the assizes for the information of the Judges; but neither of those statutes made the examination a judicial inquiry. I take it to be perfectly clear, therefore, that neither by the common law, nor under these statutes, does any such right exist, which is now claimed. If there be nothing in the common law or the statute law, to support it, then the pleas which the defendants have pleaded are an answer to this action. But it appears to me, that there is nothing in principle to support such a right. I know not what

business this person has to come before the Justices to cross-examine the witnesses for the prosecution, and to offer opposing testimony on behalf of the prisoner. I am of opinion that he had no authority to do that, because it is clear, that previous to the statute 1 *Anne*, st. 2. c. 9, to which reference has been made, the examination of opposing testimony for the prisoner, could not have been received upon oath even upon the trial, and it would been a most extraordinary thing, that the Magistrates should receive opposing testimony on oath, when the same witnesses whom he had examined upon oath, could not have been so examined when the prisoner was put upon his trial. I am aware that they might have been examined without oath, but information given not upon oath, would not be any evidence on the part of the Crown, though it was taken before the Justices, and such evidence would avail the prisoner nothing upon his trial, because the Justices are only bound to take so much of the evidence on oath as is necessary to prove the felony. It is said on the authority of Lord *Coke*, that opposing witnesses might be examined on oath previous to the statute 1 *Anne*, c. 9. I respect the authority of Lord *Coke* as much as any man, but his authority stands unsupported by any case. It is opposed by the general practice previous to the statute of *Anne*, and his opinion is opposed by several other statutes, but particularly by 31 *Eliz.* c. 4. against the Embezzling of Armour, and also by the statute of 1 & 2 *P. & M.* It appears to me, that these statutes abundantly weigh down the authority of Lord *Coke*. I cannot help observing, that though I do not agree in the law as laid down by *Dalton*, with respect to the duty of a Justice of the Peace in committing a man for trial, though he is satisfied of his innocence, yet it is fit for the Court to consider the state of the law at the time *Dalton* wrote. Since his time, Courts of Justice have been in the habit

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of construing the criminal law of the country, as favourably as possible to the liberty of the subject; but I have no doubt that *Dalton's* was the law at that time. Improvements however, have been made in this most important branch of the law, and advantages have been given to the subjects of the country which they had never before enjoyed. Amongst others is the great advantages arising from the statute 1 *Anne*, c. 9, which gives the prisoner the benefit of having his witnesses examined on oath upon his trial; and the inestimable advantage of the statute of *William*, which allows the party to make a full defence in cases of misdemeanor. For these reasons I am clearly of opinion that the claim which the plaintiff attempts to make is not made out, and that the defendants are entitled to judgment. This point has indeed been already decided by *Rex v. Borron*. My Lord Chief Justice, in giving the judgment of the Court in that case, (which was well considered by every one of the Judges) decides this very question. I admit undoubtedly, that the decision of that case turned upon another ground, but still it must be considered as an authority solemnly decided. At the same time I do not feel myself so bound by that case, as not to reconsider it if it should ever become necessary; but, independently of that case, I am clearly of opinion that this right is not made out, and I come to this conclusion, without reference to the judgment in the case to which I have alluded.

Judgment for the defendants.


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ELLIS, Clerk, v. ARNISON.

Tuesday,
Nov. 19.

DECLARATION in covenant upon a lease of the small tithes of certain garden ground, in the parish of *East Moulsey*, in the county of *Surrey*. Plea, first, *non est factum*; second, that by a certain Inclosure Act for inclosing the waste of the said parish, of which plaintiff was perpetual curate, the Commissioners therein named were empowered to allot to the curate, in lieu of all tithes, a certain proportion of the waste about to be inclosed, and did so allot the same, whereby the tithes and the rent before payable thereon, ceased, and were extinguished; *similiter*, to the first plea; and to the second, replication, that it was provided by the said act, that the said allotments so made to the said plaintiff "should be inclosed and fenced on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed land, or be bounded by any river or other sufficient fence, in the judgment of the Commissioners, free of expense to the plaintiff, and averring that the said allotment, &c. was not fenced or inclosed according to the said act, and in the manner therein prescribed in divers parts thereof, which were neither directed to be fenced by any other proprietor, nor adjoined any inclosed lands, nor were bounded by a river or other sufficient fence in the judgment of the said Commissioners." Issue thereon. At the trial before *Abbott*, C. J. at the *Middlesex* adjourned Sittings after last *Hilary* Term, the only question was, whether the allotment to the plaintiff, being partly bounded by an old deep ditch or drain only, was "bounded by a sufficient fence" within the meaning of this Inclosure Act. It was proved that the Commissioners

A ditch is a fence within the meaning of the General Inclosure Act, 41 Geo. 3. c. 109. Therefore where the issue was, whether a certain allotment was bounded by a sufficient fence within the meaning of a Local Inclosure Act, which required that the allotments "should be inclosed and fenced on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed land, or be bounded by any river or other sufficient fence," and the proof was, that part of the *locus in quo* was bounded by an old deep ditch:—Held, that this was a sufficient fence within the meaning of the statute.

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had adjudged it to be sufficient, but the learned Judge told the Jury, that in his opinion, a *ditch* was not a *fence* within the meaning of the Local Inclosure Act, nor within the meaning of the General Inclosure Act, 41 Geo. 3. c. 109. ss. 13. 19. 24. 25. & 26, and therefore a verdict was taken generally for the plaintiff, with liberty to the defendant to move to enter a verdict for him on the second plea, if the Court should be of a different opinion.

D. F. Jones, in *Easter Term* last, obtained a rule nisi accordingly, and

Copley, S. G. now shewed cause against the rule, and contended, that according to the universal acceptation and use of the word "fence," it must mean something erected upon, and extending above the surface of the ground. The local act of Parliament required that the fence should be a good thriving quickset hedge, unless the allotment was bounded by a river or other sufficient fence. The question is, whether a ditch is a fence? It is perhaps impossible to find any judicial decision upon such a question as this, and in the absence of such, recourse must be had, for a proper definition, to etymologists of authority. In *Johnson's Dictionary*, under the word "fence" (definition 2), are found these expletives—"inclosure, ground, hedge, fortified boundary." Now these are all clearly erections upon the surface of the earth, and it is obvious therefore, that the learned lexicographer applied that description to a "fence." He submitted, therefore, that the rule must be discharged.

D. F. Jones, in support of the rule, insisted, that the definition suggested was quite irrelevant. Inclosure of the land and exclusion of intruders, are the objects proposed by a fence, and does not a ditch effect those objects

as well as any hedge or erection, be it never so high? A dictionary can hardly be considered as an authority in this case, but there is a respectable authority the other way, for *Callis* (a), on his reading on the Statute of Sewers, expressly calls a *ditch* a *fence*, and treats them as synonymous terms. The defendant therefore on this issue is clearly entitled to a verdict.

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ABBOTT, C. J.—I was of opinion at the trial, that a ditch of the description proved in this case to have existed, was not a fence within the meaning of the Local Act, nor of the General Inclosure Act. It appeared to me, that the word “fence,” which is a general term in the General Inclosure Act, imported something more than a mere ditch, and my opinion appeared to be fortified by the language of the 25th section, which declares “that it shall be lawful for the several proprietors of the allotments, to be made in pursuance of any such act, at any seasonable time or times, within the space of seven years next after the fencing of any allotment or allotments, to set up and erect posts and rails, or other dead fences, on the outside of the ditches bounding their respective allotments, not exceeding three feet from such ditches, for the preservation of their quickset hedges; and at any seasonable time or times, before the expiration of the said term, to take and carry away the materials of such outside fences when they shall think proper.” Upon reference to this section, I thought that a mere ditch was not sufficient; but where there was a river, I thought that might be deemed a sufficient fence. This was my opinion at the trial, and I confess my mind is not free from doubt upon the subject at the present moment. My learned Brothers, however, are unanimously of opinion, that a ditch is a fence to

(a) *Callis*, tit. Ditches, 81.

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satisfy the requisites of this statute. I shall therefore only observe further, that it is much to be regretted that this point has not been settled sooner, because in the course of the last thirty years some hundreds of thousands of pounds might have been saved, which have been expended, if it had been thought sufficient, instead of doing that which has been constantly done, namely, planting quickset hedges, and putting up posts and rails to protect the fences for a certain number of years, merely to dig a ditch, and where there was a pre-existing ditch to have that alone, as part of the fence. But the majority of the Court being of opinion that this is the construction to be put upon the act, the verdict must be entered for the defendant on this issue.

Rule absolute

Saturday,
 Nov. 23.

In the Matter of JOSEPH ADDIS.

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 An order of bastardy not made until twelve years after the death of the child, whereby the putative father (who had in the mean time absconded) is adjudged to pay two several sums, one for the by-gone maintenance and the other for the costs, is void; and though the

filiating Justices commit the father upon an illegal warrant, from which he is discharged at the next Sessions, still they may afterwards issue a fresh warrant, founded on the original order, but if the case falls within 49 Geo. 3. c. 68. s. 3. as an order unappealed from, the commitment for non-payment of maintenance must be for three months, unless the money is sooner paid. A *general* commitment until the putative father pays *two several sums*, one for maintenance and the other for costs, is bad in toto.

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BY an order of bastardy, made by two Justices on the 4th of *April* last, *Joseph Addis* was directed to pay to the parish officers of *Snarestone*, in the county of *Leicester*, two several sums of 8*l.* and 17*l.*:10*s.*, the one for the costs attending the lying-in of the mother, and of apprehending and securing himself; and the other for the maintenance of the child, from its birth on the 29th *November*, 1808, to its death on the 16th *April*, 1812. In default of paying the several sums, the Justices immediately committed him to the county gaol "until those sums should be duly paid, or until he should be otherwise

delivered by due course of law." At the last *Easter Sessions* no appeal was entered against the order of filiation, but the Justices, at the *Midsummer Sessions*, discharged *Addis*, on the ground that the warrant of commitment was informal, inasmuch as it directed him to be imprisoned *quousque*, instead of being for three months, under the 49 *Geo. 3. c. 68. s. 3.* After *Addis* had been thus discharged, he was again apprehended on the 4th of *September* last, and committed to the county gaol by the filiating Justices under a fresh warrant, founded on the original order of filiation and maintenance. The warrant directed the gaoler "to receive the said *Joseph Addis* into his custody, and commit him to ward, there to remain without bail or mainprize, except he should put in sufficient surety to perform the said order, or else personally appear at the next *Quarter Sessions*, and also to abide such order as the Justices there assembled should take in that behalf, and if they should take no order, then to abide and perform the order before them." At the last *Michaelmas Sessions* there was no appeal against the order of filiation, and on a second motion to discharge him from the commitment, the Court refused to interfere, because this remedy, if any, was in this Court.

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In re *ADDIS.*

S. M. Phillips, on a former day in this Term, obtained a rule nisi for a habeas corpus, to bring up the body of *Addis* to be discharged out of custody, and he made three points. 1st. That the Justices had no authority to make an order of maintenance for a bye-gone time, the child being dead upwards of twelve years at the time the order was made. 2d. That the second commitment should have been for three months under the 49 *Geo. 3. c. 68. s. 3.* instead of under the 18 *Eliz. c. 3. s. 2*; inasmuch as the order of filiation must be considered as an order unappealed against, by reason of the first commitment,

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which put it out of the power of *Addis* to appeal, and therefore it became a case within the first-mentioned statute; and 3d. That this commitment was clearly bad in form, being until the putative father paid two several sums instead of one; the Justices having no power to commit for an indefinite period for non-payment of maintenance, that power extending only to cases where the putative father refuses to pay the expenses of filiation.

When the case came on this day, the first point was given up as untenable (a).

G. W. Marriott now shewed cause, and contended, that there was no foundation for the remaining objections. The order of bastardy in this case is made conformably to the 18 *Eliz.* c. 3., and is therefore perfectly good; and the only question is, whether the second warrant of commitment is correct in point of form. It is quite clear that the 49 *Geo.* 3. c. 68. s. 3. has no bearing upon this question, because that clause has reference only to subsequent maintenance under an order of bastardy, *already made and confirmed*, but not to enforcing the order in the first instance under the statute of *Eliz.* c. 3. It is in the event of the putative father refusing, *from time to time*, to obey the order so made and confirmed, that the Justices, for the purpose of enforcing it, are empowered, by the 49 *Geo.* 3. s. 3. to commit the father for three months, or until the maintenance-money is paid. Unless, therefore, it can be shewn that this is a case within that statute, the objection falls to the ground. This is clearly not to be considered as an order unappealed against, so as to bring it within that statute. It cannot be said that *Addis* was deprived of his appeal under either the first or the second commitment. Supposing the first commit-

(a) See *Regina v. Odam*, 1 Salk. 124. *Rex v. Fox*, 1 Bott. 5th edit. 477. *Rex v. Eve*, Id. 471. *Rex v. Moravia*, Id. 492. *Rex v. Miles*, Id. 473. *Rex v. Hill*, 1 Sid. 326. *Rex v. Sweet*, 9 East, 25.

ment to be illegal, still there was nothing to prevent his appealing against the order of filiation. It is clear that the Sessions had no right to discharge him from the first commitment, the order itself being perfectly regular, and no appeal against it; but having discharged him, it was competent for the filiating Justices to commit him again, as they had done under the second warrant, even then he might have appealed to the *Michaelmas* Sessions against the order. *Rex v. Hill(a)*. But he neglected so to do, and therefore the order was conclusive against him, and he remained committed on that order. This case then being out of the purview of the statute 49 Geo. 3. the only remaining question is, whether the commitment is bad in point of form. Supposing this to be a case within the latter statute, and that the commitment should have been for three months instead of for an uncertain time, for not paying the maintenance-money, still the commitment would be good *quoad* the 8*l.* for costs, by force of the 4th section of the 49 Geo. 3., and the Court might reject the 17*l.*:10*s.* as surplusage. There is no doubt that the Justices may commit generally for the non-payment of the expenses, and therefore, though they had no such power with respect to the maintenance, still the commitment here would be good *pro tanto*, according to the authority of many decided cases. It would lead to the greatest inconvenience in practice if there were to be two commitments, one for maintenance, and the order for the expenses of apprehension, &c.

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Phillips, contra, was stopped by the Court.

ABBOTT, C. J.—The question in this case is, whether a warrant in this form is good. If it is not good there may be another warrant made out to commit the party for

(a) 1 Sid. 326. See *Rex v. Messenger*, 1 Bott. 5th edit. 474. and *Rex v. Smith*, Bulst. 342.

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three months, if this is now to be considered as an order unappealed against, which I am inclined to think it is. A defect in the warrant will not vitiate the order, which, in this case, appears to me perfectly correct; but the difficulty I have, is in saying that the warrant is correct. If there has been a good order made for maintenance, and there has been no appeal against it, then the Justices are to proceed under the 49 Geo. 3. c. 68. s. 3. This is a good order of maintenance, but the Justices have no right to issue their warrant to commit the party for the maintenance, and also for the expenses of apprehending, &c. for an indefinite period. The objection to the warrant is, that the party is committed generally, until he pays two different sums, when it should have been a commitment for one only. The commitment under the statute of *Elizabeth* is only until the next Sessions, in default of the party entering into recognizances and giving security; but here he is committed not merely for the maintenance-money, but also in respect of the expenses of apprehending him and making the order of filiation, which latter are only given by the 49 Geo. 3. in the cases mentioned in the 3d section. The order may be good but the commitment is bad, being for two sums, and as the commitment is illegal as to one, it is bad *in toto*.

BAYLEY, J.—I am of the same opinion. We cannot hold the commitment to be bad in part, and good as to the rest. The commitment here is until he pays two different sums, whereas it should be until he paid one only. This commitment is bad as to the 17l:10s. and therefore it is bad as to the rest. The order, however, being good, it may still be enforced.

HOLROYD, J. was of the same opinion (a).

Rule absolute.

(a) *Best*, J., was absent.

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The KING v. The BAILIFFS and CORPORATION of
the BOROUGH of EYE.

Saturday,
Nov. 23.

SCARLETT (with whom was *H. Cooper*) moved for a rule to shew cause why a mandamus should not issue to the defendants, commanding them to admit *George Twitchett* to the freedom of the borough of *Eye*. The affidavit upon which the motion was founded, stated, that the borough of *Eye* is, and has been from time immemorial, an ancient borough, and both by prescription and charters, and letters patent successively granted by *Hen. 6. Hen. 8. Edw. 6. Eliz. Jac. 1. and 9 Will. 3.* was incorporated under the name and title of “The Bailiffs, Burgesses, and Commonalty of *Eye*;” that it consisted of twelve capital burgesses, out of whom the bailiffs were chosen, twenty-four common councilmen, and an indefinite number of freemen. The charters and letters patent did not point out who were entitled to be admitted freemen, but in the 8th *Eliz.* the corporation passed a bye-law, which ordained, that as often as any vacancies should happen, by death or otherwise, in the number of the twelve capital burgesses, the number remaining should elect others out of the common council of twenty-four, to fill up such vacancies, and that upon the happening of any vacancies in the number of twenty-four common councilmen, such vacancies should be filled by freemen inhabiting within the town, and who had been resident and dwelling therein for the space of one year at least, to be elected by a majority of those remaining of the twenty-four, and that once in every quarter of a year the bailiffs should hold a great Court, for the purpose of granting

The words “shall be lawful,” when found in the bye-law of a corporation, are not to be construed as obligatory to do what the law ordains. Therefore where a bye-law of the borough of *Eye* ordained, that upon the happening of any vacancy in the number of twenty-four common councilmen, such vacancies should be filled by the freemen inhabiting the town, and that a great Court should be holden once every quarter, at which “it should be lawful” for the bailiffs to admit to the freedom of the town such persons as had been resident therein for one whole year:—Held, that this bye-law was only optional, and could not be enforced by mandamus to compel the admission of qualified inhabitants to the freedom of the borough.

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admission to the freedom of the borough, the bye-law then ran thus :—

“ Item, that at every of the said general Courts *it shall be lawful* for the bailiffs to admit into the freedom of the town such person or persons as shall be suitors for the same, and withal shall be thought honest and well-disposed men, and being such as are resiant and dwelling within the town of *Eye* by the space of one whole year at the least, so that the said person or persons so admitted do take such oath presently there, at the time of his admittance, as in the book expressed to be taken by him or them, and so that the same freeman do pay there presently for such his admittance, to the said bailiffs or one of them, six shillings of lawful *English* money, and fourpence to the steward for recording his name and admission.”

The affidavit then proceeded to state, that *George Twitchett* had been resident and dwelling in the borough of *Eye* for the space of one whole year, on the 27th *October*, 1820, being the day when one of the great Courts was held by the bailiffs of the town, and attended the said Court, and requested and demanded of the bailiffs to be admitted to the freedom of the borough, by reason of his residency and inhabitancy, and then declared himself ready to take the requisite oaths, and to pay his admission fees, but the bailiffs wholly refused to admit him to his freedom. The affidavit proceeded further to state, that he had carried on the business of a tallow-chandler in the borough during a period of six years, and had always been ready to take up his freedom and comply with all the laws and customs of the borough, and that nevertheless he had not only been refused his freedom, but had been fined and amerced by the Courts of View



and Frank-pledge held by the bailiffs, and had been twice served with summonses to pay, or shew cause why he should not pay such fines or amerciaments for carrying on trade in the town, not being a freeman. Under these circumstances the question was, whether the bye-law set out in the affidavits was compulsory on the defendants to admit the prosecutor to his freedom. The learned counsel contended, that the words "it shall be lawful for the bailiffs to admit," were to be construed as imperative upon the bailiffs to admit any person who was qualified to be a freeman by residency and inhabitancy, according to the terms of the bye-law. He relied upon *Rex v. The Mayor and Jurats of Hastings* (a) as an authority to shew, that if there are words of permission in an Act of Parliament tending to promote the public benefit, they are always held to be compulsory. If this doctrine applied to an Act of Parliament which affected the whole kingdom, there seemed to be no sensible reason why the same principle should not be applied to the bye-law of a Corporation, if ordained for the benefit of the public within the local limits. The same reason was applicable in both cases. In this case the bye-law was obviously calculated for the benefit of the inhabitants of the borough of *Eye*. In the first place, no person could carry on trade unless he was a freeman, and in this very case the prosecutor had been fined for carrying on trade without taking up his freedom. But, in the second place, as respected the elective franchise, the bye-law was of the greatest importance, and if not enforced, it would lead to this necessary consequence, that the right of voting for Members of Parliament would remain solely in the bailiffs and capital burgesses, instead of being extended to the freemen at large, whose numbers might be limited

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(a) Ante, vol. i. page 143.

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at the discretion of the bailiffs and burgesses. If, then, the words "shall be lawful," were to have the same import as they are considered to have in a public Act of Parliament, this application could hardly be denied.

ABBOTT, C. J.—It is not our province to decide whether the exclusion of persons from the freedom of this borough be lawful or unlawful, but we are called upon to say whether this old bye-law is to be considered as imperative upon the bailiffs and corporation of the borough, because it is declared, "that it shall be lawful" for them to admit qualified inhabitants to their freedom. It is not suggested that there is any charter of this Corporation containing similar words, shewing in what manner the freemen are to be elected, and as recourse has been had to this ancient bye-law, we have a right to suppose that no such charter existed. However, it is said, that we ought to give the same force and effect to this bye-law as we should give to a public Act of Parliament. I am of opinion, that we cannot go that length. The words "it shall be lawful" when they are found in a charter of incorporation or in a bye-law, evidently import that those who are to act upon it are to exercise a discretion whether they shall choose so to do, or whether it is advisable so to do. These words occur in many charters, with reference to the power of filling up the corporate body in case of vacancies, but they do not carry with them the force of an imperative law. I recollect in one case Mr. Justice *Chambre* has said, that whether the words "shall be lawful" are to be expounded imperatively or not, must depend upon the subject-matter to which they apply. I think the words give a discretionary power to the bailiffs to admit to the freedom, and that no absolute right is given to the qualified inhabitants. It can hardly be supposed that



the corporation meant to bind themselves imperatively by this bye-law, more especially as these words are not to be found in any of the charters. The practice has always been to construe these words optionally. I think, therefore, we cannot grant this application.

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BAYLEY, J.—The words “shall and may be lawful” may be obligatory in an Act of Parliament, but it is impossible to say, that they are obligatory in a bye-law. The case of *Rex v. The Mayor of Hastings*, was an application for a mandamus to hold a court of record for the recovery of debts, pursuant to the terms of the charter of the corporation, but this case is distinguishable from that.

The rest of the Court concurred.

Rule refused (a).

(a) Vide *Drage v. Brand*, 2 Wils. 377. *Paull v. Rogers*, 5 T. R. 540. *Roles v. Rosewell*, Idem, 538. *Woolcot v. Goulding*, 8 T. R. 126. In the case of *Rex v. The Stewards, &c. of the Manor of Havering Atte Bower*, Easter Term, 3 Geo. 4. An application was made to this Court for a mandamus to the stewards and suitors of the court of the lordship or manor of *Havering Atte Bower*, in the county of *Essex*, to receive the plaint of one *Wood* against another person named *Butcher*, and to issue process thereon, and to proceed to hear and determine the plaint, pursuant to the charter, 2 Jac. 1. In that case the charter granted to the steward and suitors of the Court belonging to the manor (which was of ancient demesne) power and authority to hear and determine, by plaints, to be levied and prosecuted in the Court, pleas, debts, accounts, covenants, trespasses, as well by force and arms committed, as otherwise, detention of chattels, and all other contracts whatsoever, within the lordship, &c. made, done, or arising, although the same debts, accounts, &c. amounted to or exceeded forty shillings. It appeared that this charter had been constantly acted upon, the Court having been regularly held once in three weeks, but it also appeared from the records, that there had been no plaint for a debt or contract heard been disused for that purpose during fifty years:—Held, that mandamus would lie to compel the court to be held again, notwithstanding the non-user for such purpose.

If a royal charter contains words of permission to do an act which is clearly for the public benefit, they are obligatory; therefore where a charter of Jac. 1, granted to the steward and suitors of a manor, power and authority, to hold a court for the purpose, (amongst other objects) of hearing and determining pleas of debt, &c. but the court had

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and determined since the year 1796. No suit in replevin had been instituted since 1790, and the last instance of a suit in ejectment was in 1805; but for other business, such as for levying fines, and suffering recoveries, respecting lands within the manor, the Court had since then been constantly held. In *January* last, the prosecutor *Wood* had appeared before a Court, duly held by the steward and suitors, and demanded to levy a plaint against *Butcher*, for the recovery of a debt under 40s. arising within the manor, of which both were tenants. It was contended, in answer to the motion for a mandamus, that as there had been no plaint of this kind levied in the manor Court for a period of fifty years, the steward and suitors had now no authority to hold such a Court for the recovery of debts, and that the disuse of it was conclusive upon the subject; but

The Court, referring to the case of *Rex v. The Mayor and Jurats of Hastings*, said, that a Court of this kind, being established for the public benefit, the words of permission used in the charter, were obligatory, and the right of determining suits of the description mentioned, could not be lost by the disuse relied upon; and therefore the rule was made absolute.

Chitty was for Crown, and *Gaselee* for the defendants.



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Mandamus will not lie to admit an inhabitant of a borough by prescription to be a free burgess, unless it appears first that he has an inchoate right to be a free burgess, and, second, that the office of free burgess is a corporate office by prescription.

The KING v. The Mayor, &c. of WEST LOOE.

MEREWETHER moved for a rule to shew cause why a mandamus should not issue to the Mayor, Steward, and Free Burgesses of the borough of *West Looe*, in the county of *Cornwall*, and to the Jury at the next Court-leet, commanding them to hear evidence, and to inquire whether *Thomas Rendle* is, and for the last year and upwards has been, an inhabitant of the said borough, and if found so to be, and not to be otherwise disqualified, to present, swear, and admit him to be a free burgess of the said borough.

The motion was founded upon long affidavits, the material facts in which appeared to be the following:—The



borough of *West Looe* is an ancient borough by prescription, sending, as well before the charter of *Elizabeth* as after, two Members to Parliament, the right to elect whom is in the Mayor and Burgesses. By a charter of *Richard* Earl of *Poictier* and *Cornwall* to *Odo de Treverlen*, his borough of *Portlyan* or *West Looe* was made a free borough, and, amongst other things, the burgesses of the same were to be free and quit of all customs, and if any one should reside for a year and a day in the same borough without just claim, he should, according to the law of other free burgesses, be quit from niefy and servitude. By the charter of 16th *Elizabeth* the inhabitants were incorporated by the name of "The Mayor and Burgesses," and it appears by that charter and the records of the borough, that the inhabitants of the borough were the burgesses thereof; but neither the charter nor any surviving bye-law contains any provision for the election of burgesses. There is a prescriptive Court-leet in the borough, and a steward thereof, which the charter of *Elizabeth* recognises and directs to be held before the mayor and steward. Records of the Court in the reign of *Henry* 8. are extant, from which it appears that the Jury presented the defaults of suitors; and by other records of the Court, it appears that lists, in which the resiants were enrolled, were made, called over, and presented at the Court, and amerciaments made for defaults. In 1613, one was sworn as an inhabitant, and duly put into the next list of resiants, and afterwards filled offices in the borough, which require the previous qualification of being a burgess. The list of resiants was continued down to 1651, when a list of censores, and at other times of freemen, was substituted in its stead. In 1652 eleven persons were presented by the Jury at the Court-leet for not being *freemen*; in 1653, three, for dwelling in the town, not being *sworn freemen*; and afterwards many

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others, for not being sworn freemen, or *townsmen*; and in 1654 one was presented by the Jury, and sworn a freeman. In 1660 the list of *resiants* was resumed, and that of freemen omitted, and in 1662 the same, and so down to 1678, when, at a Court, held before the mayor and *four* capital burgesses, three persons were sworn free burgesses, from which time *a list of free burgesses was substituted for the list of resiants*, and the mayor and capital burgesses assumed to themselves the right of nominating, admitting, and swearing free burgesses; and the Courts were very irregularly held, and often altogether omitted, down to 1708, when the Jury presented "that no one ought to be sworn free of the borough unless presented by the Jury;" and they then accordingly presented one, who was sworn, and long acted as a free burgess. In 1710 the Jury presented "all their ancient customs to be good and laudable, and all who owe suit and service, and have made default," and they presented five persons as fit to be sworn freemen; and a like number in 1712, but in the middle of the page of the book containing the latter presentments, a piece is cut out. In 1714 the mayor assumed to himself to propose to his brethren, persons to be sworn freemen, and continued so to do till 1762, when the mayor for the time being was removed by *quo warranto*. In 1763, thirty-nine inhabitants were admitted free burgesses, and one free burgess was removed by *quo warranto*, *for not being an inhabitant*; and in 1764, thirty-two burgesses resigned, and several others were removed by *quo warranto*. No Court-leet was held for many years, but in 1765 a Court-leet was held, and seventy-seven persons resigned as burgesses. At a Court held 22d October, 1822, before the mayor and eight capital burgesses, but no steward present, several *resiant* householders, paying scot and lot, appeared and claimed to be presented, admitted, and sworn free

burgesses. They protested against the absence of the steward, but the mayor persisted in proceeding. A written notice of their claim was tendered to the Jury, but by the mayor's direction rejected; and the Jury also, by the mayor's direction, declined to present the claimants. *Thomas Rendle* was one of the persons then claiming to be presented, and rejected. There are now only thirty-two free burgesses of the borough; twenty-two of them live out of the borough, and there are eighty resiant householders in the borough paying scot and lot, entitled to be made free burgesses, and whom the mayor, steward, burgesses, and jury, arbitrarily refuse to admit.

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Upon these facts it was contended, that this being a borough by prescription, whatever the ancient mode of creating burgesses was, the same it must be now. From these affidavits it appeared, that free burgesses and resiants were the same; and that the resiants were, in this borough, in conformity with the common law, presented, enrolled, called over, and sworn by the Jury at the Court-leet. By the ancient practice of the borough, as well as by the law, it was the duty of every resiant to attend at the Court-leet, and to be enrolled and sworn there, and give his pledges, otherwise he was subject to be imprisoned, and was in effect an outlaw (*a*). It was the practice of the Jury in this borough, and their bounden duty by the law, to present all resiants to be enrolled and sworn, and to give pledges, and if not done, to present any default in any of these respects (*b*). This duty was so imperative that the King could not grant to any man that he should be exempt from this suit (*c*), and consequently no subsequent charter of the Crown could

(*a*) 2 Inst. 72. Com. Dig. tit. Leet. Kitchen, on Court Leets, 66-7.

(*b*) Kitchen, on Court Leets, 12. 19. 103.

(*c*) 2 Rol. 5.

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have affected this mode of presenting, &c. the free burgesses, so as to exempt any resident from his obligation to be presented, or the Jury from presenting him, and therefore the Jury should be compelled by mandamus to do their duty in that respect, particularly as there was no other legal mode prescribed for making burgesses in this borough, the proceedings of the mayor and capital burgesses being clearly illegal, not being supportable by the charter of *Elizabeth* if put upon that ground, and being an usurpation as indicated by its irregularity. (*Bayley, J.* Surely a free burgess is a corporate officer.) Not *ex vi termini*:—a free burgess is a free inhabitant of a borough: he may in some cases also undoubtedly be a corporator, as he is in this case by the charter of *Elizabeth*, which superadds the corporate character to that of a free burgess presented and enrolled at the Court-leet; a free burgess, therefore, is not necessarily a corporator, for there are many boroughs which are not corporations. (*Bayley, J.*—Then the Court cannot interfere by mandamus. *Abbott, C. J.* A free burgess, under a charter of *Elizabeth*, is certainly a corporator; but he is a corporator without prescriptive right; the Court-leet may be prescriptive, but it does not therefore follow that there is a prescriptive right to admission, and it appears here that there is not. So that this difficulty arises. If a free burgess under this charter is *not* a corporate officer, we cannot interfere by mandamus; if he is, still, as he has no prescriptive right of admission to the office, we are equally prevented from interposing. I am not aware of any authority to shew that the Court has ever granted a mandamus in either of the cases.) The free burgesses of this borough are not under the charter of *Elizabeth*; there were free burgesses these three centuries before the date of that charter, which is sufficient evidence of their having existed time out of mind; and the common law,

which clearly existed before that period, required every resiant to be enrolled and to take his oath of allegiance, before the sheriff, if he was a resiant or inhabitant of the county at large, and before the reeve of the borough, if he was a resiant or inhabitant of a borough. A right and obligation to be enrolled, was therefore cast upon every inhabitant of the borough before the time of legal memory, and a free inhabitant of a borough being so enrolled, was thereby admitted a free burgess of the borough. (*Bayley, J.* No; that is not the necessary consequence. The effect of it is merely this, that they become freemen, and cease to be considered *vileins*. The residence for a year, as necessary to make a man free, applies only to *vileins*: there were many other modes of becoming free: and all freemen, whether they become free in that way, or otherwise, were bound to be enrolled wherever they were free inhabitants: if in a borough they were free burgesses.) No other mode of admission is prescribed by any charter or bye-law of this borough, nor attempted to be put in practice till 1678, when the admission is clearly illegal, being by the mayor and capital burgesses only. The Court then will interfere by mandamus to have the law put in force, and justice done, though the matter do not relate to a corporate office. The instances in which writs of mandamus have been granted for corporate offices are very few, compared with the other occasions to which they have been applied. He cited *Rex v. The Borough of Midhurst (a)* and *Rex v. Lord Montacute (b)*.

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Per Curiam.—The cases cited will not support the present application. In both those cases there was a freehold interest in land, and there was considered to be a prescriptive right in the parties to vote for the election

(a) 1 Wils. 283.

(b) 1 Sir W. Bla. 60.

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of Members of Parliament, and it was upon these grounds that the Court there granted the writ. Those grounds are wanting here; at least the affidavits do not state them; if they did, this case might appear in a very different light before us. The object here is, to persuade the Court to order a party to be admitted to an office which is to confer some benefit upon him, without shewing that he has any inchoate title by prescription to fill that office or receive that benefit. A free burgess in this case is a corporate officer; but he is a corporate officer without a prescriptive right, and in favour of such a party mandamus will not go. If the other ground is taken the impediment is equally strong, for if he is not a corporate officer, we cannot interfere in the mode suggested.

Rule refused.

*Merewether* the next day moved for a rule nisi for an information in the nature of a *quo warranto* against the mayor of the same borough, upon affidavits, stating, in addition to some of the former facts, that the mayor is the returning officer of the borough, and that the charter of *Elizabeth* directs that there shall be twelve principal burgesses to assist the mayor, and that the mayor and principal burgesses shall every year name two principal burgesses before the other inhabitants of the borough, who are to elect one of those two to be mayor for the year ensuing. It appeared that the persons to whom their nomination was given, and by whom the subsequent election was made, were variously named in the corporation books, being sometimes called *burgesses*, and at other times, *common burgesses*, *freemen*, *commons*, *commonalty*, and since 1678 *free burgesses*; all which terms appear from the records of the borough to describe the same class of persons, and to shew, that the inhabitants

were the freemen, commonalty, or common burgesses; and that at the last election of mayor, the inhabitants tendered their votes, but were rejected. This he contended was contrary to the charter, but

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*The Court* said, that the word "inhabitants" in the charter, clearly meant the burgesses, and therefore

Refused the Rule.

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**D**EBT on the statute 55 Geo. 3. c. 137. s. 6. for penalties. The declaration contained sixteen counts. The first count stated, that defendant, on the 1st of *June*, 1820, was overseer of the poor of the parish of *Westhampnett*, in the county of *Sussex*, duly appointed in that behalf, and that while he was such overseer he furnished and supplied, in his own name, and for his own profit, certain goods and provisions for the maintenance of the poor of the said parish. The second count described him as collector of the rates of the parish; the third, as a person having the providing for, ordering, management, control, and direction of the poor of the parish; the fourth, fifth, and sixth counts, were framed upon the three first, with slight variations; there were then two sets of counts, charging the

An acting guardian of the poor is liable to the penalties of the statute 55 Geo. 3. c. 137. s. 6. for supplying the poor of the parish with provisions, though there be no proof of his appointment. If a parish officer is liable to the penalties imposed by 22 Geo. 3. c. 83. s. 42, still he may be proceeded against under the

general act 55 Geo. 3. c. 137, without regard to the former statute. Where the declaration alleged that the defendant was a person having the providing for, ordering, management, control, and direction of the poor of the parish of *W.*, and that he had supplied the poor of the parish with provisions; and it appearing that *W.* was one of five united parishes, whose poor were jointly maintained by all the parishes in one common workhouse:—Held, that the offence was well laid. *Semble*, that the declaration need not have alleged that the provisions were supplied "for the use of the workhouse," in order to bring the case within the statute.

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defendant with supplying goods for the workhouse of the parish; and the remaining four charged him as a person, amongst others, in whose hands the providing for, &c. the poor of five united parishes, was placed, *Westhampnett* being one, and supplying the goods in question. Plea, Not Guilty and issue thereon. At the trial before *Wood*, Baron, at the last *Lent* Assizes for the county of *Susser*, it appeared that the defendant acted as one of the guardians of the poor during the year 1820, but there was no evidence of his appointment to the office, and objection being taken that his appointment should have been produced, was over-ruled. The poor-house was under the control of the guardians of the united parishes, but was managed by one *Griffiths*, who was appointed by, and received directions from them, and who supplied the provisions at a certain rate *per head*. In the year 1820 he purchased some ewe sheep of defendant for the use of the poor-house and himself, and paid him for them. It was then objected for the defendant that this evidence was insufficient to support the declaration, but the learned Judge thought the evidence was such as brought the defendant within the statute, and the plaintiff had a verdict, by his own election, upon the third count only.

*Marryatt*, in *Easter Term*, obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted.

*Gurney* and *Long* now appeared to shew cause, but was stopped by the Court, who called upon

*Marryatt* and *Courthope*, in support of the rule. As the plaintiff has elected to enter the verdict upon the third count only, the argument in this case may be confined to that count. There are several objections to it.

First, the statute upon which this action is brought is not applicable to the case. The parish in question is one of several united parishes under one and the same management, having one joint poor-house, and therefore all offences connected with the poor are properly punishable under the former statute 22 Geo. 3. c. 83. s. 42. the penalty in which is only 20*l*. But second, the defendant is described "as a person in whose hands the providing for, ordering, management, control, and direction of the poor of the said parish is placed," which is a misdescription of him in two particulars, for, as guardian only, he has no share in the provision, management, or control of the poor at all; they are in the hands of the overseers; the guardians have only to superintend the conduct of those who have the management of the poor, they have nothing to do with the poor themselves;—and if the defendant has any share in the management of the poor, still it is not of the poor "of the said parish," for the poor of that parish are managed jointly with those of four others. Then, third, to bring the cause within this statute, it should at all events have been alleged that the provisions were supplied for "the use of the workhouse," and not for the use of the poor of the parish; the object of the 6th section of the statute being, to prohibit the churchwarden, &c. from supplying provisions "for the use of any workhouse, or workhouses;" on these grounds the defendant is entitled to a new trial.

ABBOTT, C. J.—According to what took place at the trial of this case, if there is any one count in the declaration sustained by the evidence, the plaintiff is entitled to retain his verdict, and I think we ought not to yield to any objection in point of form, not made before the learned Judge. One objection is, that the defendant is not properly described in the declaration. In some counts

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he is described as a person having the providing for, management, &c. of the poor of the particular parish of *Westhampnett* by name. If that description of him is sustained by the evidence, the objection fails. I take it, that where parishes are united under 22 *Geo. 3. c. 83.* guardians are to be appointed for each parish, who are constituted overseers of the poor of the particular parish for which they are appointed, and have many exclusive duties to perform respecting their own parish, but also for several purposes become guardians of the united parishes; and therefore that as regards their own particular parish, their office is several, but, as respects the united parishes, it is joint. That being so, I am of opinion that this defendant must be considered as a person having the management, control, and direction of the poor of that parish for which he is appointed. Though the declaration may contain one or more words descriptive of the duties of the defendant, which are not sustained by the evidence, yet I think such an objection ought not to prevail, it being sufficient in my opinion that the allegation should in substance be made out. Another objection taken is, that all the counts of the declaration charge the defendant with having supplied these provisions for the maintenance of the poor of the parish of *Westhampnett* generally, whereas, according to the evidence, they were supplied, not for the maintenance of the poor of this parish, but for the supply of *the workhouse*, in which the poor of the united parishes are maintained. And then it is contended, that as the statute contains two particular classes of cases to which it is to apply, namely, where the provisions are supplied "for the use of any *workhouse* or *otherwise*," and as these sheep were sold to be used in *the workhouse*, those counts of the declaration which allege them to have been sold for the maintenance of the poor of *the parish*, are not proved, because the allegation

ought to have been that they were supplied for the use of the *workhouse*. This objection was not taken at *Nisi Prius*, but if it had been taken, I am by no means satisfied that it ought to have prevailed, because the language of the 6th section is, “for the use of any workhouse or workhouses, or *otherwise*, for the support and maintenance of the poor. Now to supply provisions for the use of the workhouse, is one mode of supplying for the support and maintenance of the poor. I am not satisfied that this objection ought to prevail, but not having been made at the trial I think it ought not to prevail now. It is of great importance that these objections in point of form, which are often taken contrary to the justice of the case, should be presented distinctly to the Judge at the trial, for, if tenable, then great expense to the parties would be saved. This is an objection of form and not of substance, and I think we ought not to give effect to it, especially where it is a matter of so much doubt. I think this rule ought to be discharged.

BAYLEY, J.—I am of the same opinion. The 55 Geo. 3. c. 137. was intended, as it seems to me, to establish one general provision throughout the kingdom in cases of this description, and that it was not the intention of the Legislature that there should be one rule under the 22 Geo. 3. c. 83. as to those parishes which were united under that act, and another rule as to those parishes not so united. There is a provision in the latter statute under which this case might have fallen, provided the 55 Geo. 3. had not been passed; but that would have been a provision local in its nature, and only applicable to particular places; but in the general provision which was afterwards made by the 55 Geo. 3. there is no exception as to those places comprehended in Mr. *Gilbert's* Act. I do not think it was the intention of the Legislature to except those cases which were

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previously made liable to penalties under the provisions of the 22 Geo. 3. I can see no reason for such an exception; nor can I comprehend why a provision should be made as to one description of poor-house, different from that applicable to another if they are both of the same nature. There being no exception in the 55 Geo. 3. and the provision being general, I think we are bound to consider this case as coming within the operation of that statute. With respect to those persons who are guardians of the poor under the 22 Geo. 3., and who have the order, management, control, and direction of the poor of the parish in which they are appointed; it seems to me, that they fall most strictly under the provisions and are within the range of those mischiefs which the 55 Geo. 3. was intended to remedy. They have the power of appointing the person who is to provide for the poor, and make contracts for the diet and cloathing of the paupers in the workhouse. That person is placed under the strict inspection and control of the overseer, guardians, and governors of the poor. Why then each guardian has a distinct duty to perform. He is carefully and strictly to see that the diet supplied for the poor is good and wholesome; but all that strict care and inspection, will be liable to be superseded, the person who is to make the inspection is also to supply the article which the poor are to eat. I think therefore that this comes already within the mischiefs which the statute intended to remedy. As to the objection that the declaration in this case ought to have described this as a supply "for the workhouse," and not for the poor of the parish, I think it is not tenable. If the poor of this particular parish are maintained in a workhouse which is common to the united parishes, still this would be a supply for the poor of the particular parish. But whether the poor are supplied in the workhouse or out of it, seems to me to be quite immaterial

for the purpose of this case. It is said that this is not a supply for the poor of this specific parish, because it is united with other parishes. This is a very fallacious argument, for if I supply provisions for *A. B. and C.* and they dine jointly together, I supply each and every of them individually. It seems to me therefore, that none of the objections in this case are well founded.

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HOLROYD, J.—I am also of the same opinion. I think it quite clear that the 55 Geo. 3. being a general law is sufficient to comprehend the case to which Mr. Gilbert's Act applies; and I am of opinion that this case is clearly within the words as well as the spirit and meaning of the general act. As to the objection that the defendant in this case had not "the providing for, ordering, management, control, and direction of the poor" of *this parish*, I think he had such a control as brings him within the operation of the act, and at all events within the alternative part of the 6th section. But it is said, that inasmuch as he was guardian of the poor of the *united parishes*, he is not properly described in the declaration as being the guardian of this parish, because his duty was not confined to this particular parish only. It is contended, therefore, that the allegation in the declaration that he was guardian of the poor of this particular parish is not proved. I however am of a different opinion. I take this declaration to be drawn consistently with sound rules of pleading. It is an established rule of pleading, that it is not necessary to make the allegation to the full extent to which the proof will go. Suppose, in the case of a prescription for a right of common for sheep, and the proof is of a right *for all sorts of commonable cattle*; it has been expressly held, that the allegation is made out, and that it is not necessary to make the allegation co-extensive with the right. This applies directly to the principle in this

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case. But there is no occasion to resort to any rules of law upon the subject, for it seems to be perfectly clear, that if it was the duty of the defendant as guardian, to superintend the maintenance of the poor of the united parishes, the allegation that he had the control and superintendence of the poor of the particular parish is sufficient to sustain this action. As to the other objection, that it is not alleged that the supply was for the *workhouse*, but for the poor generally, I am by no means satisfied that it would have been a good objection if taken at the trial; but not having been taken then, I think we ought not to give any weight to it now, conceiving, as I do, that the most mischievous and unjust consequences would result if parties were allowed to keep back objections in point of form, and after taking the chance at the trial upon the merits, then bring them forward after the merits are found against them. I therefore think that this verdict ought not to be disturbed.

BEST, J.—Objections in point of form are not at any time entitled to much encouragement, but certainly not after trial, and for this obvious reason, that if they are taken at the trial, they may be immediately answered by facts, perhaps within the power of the other party to give in evidence. The first objection taken in this case at the trial was, that the defendant was a guardian of the poor of five parishes, and therefore that the declaration was insufficient; but the answer to that was, that he acted in the management of the poor of the particular parish mentioned in the declaration; and I think that was a sufficient answer in point of fact so as to remove the objection. The next objection taken was, that it was necessary to prove the defendant's appointment as a guardian. That I think was not necessary. It was sufficient to prove him acting in the character of guardian; for it has been de-

cided, that if a man is charged with doing a particular thing whilst he is cloathed with a particular character, if he acts in that character the Court will presume that he is legally appointed. That was laid down by Mr. Justice *Buller* in the case of a Custom-house officer. If a man acts in the character of a rector or vicar of a parish, is it necessary to prove his induction and institution? Until the contrary is shewn it is sufficient to prove, that the party acts in the character to justify the Court in presuming that he is properly appointed. In this case I think it was no objection that this defendant was employed in the management of the poor of five united parishes; for if he was employed in the management of them all, he was employed for every one, and therefore the declaration properly describes him as the guardian of the particular parish. There are many parishes in *London* which are united, but still they exist as separate parishes for all purposes except that which relates to the management of the poor under Mr. *Gilbert's* Act. The parish of *Westhampnett*, though it is united with other parishes under that statute, still may be described as a separate parish, and therefore a man who acts for the five united parishes, may be said to act for each of the five. Then it is said that this defendant ought to have been proceeded against under Mr. *Gilbert's* Act, because these parishes are united. That by no means follows. It appears to me that it would have been a most extraordinary circumstance, if, when the Legislature passed the 55 *Geo. 3.* and thought fit to make a general regulation applicable to every person who had the management of the poor of any parish, and subjected him to a penalty of 100*l.* for selling provisions to the poor, they should have exempted united parishes (where there is much greater latitude for abuses of this kind) from the operation of the statute. It appears to me to be impossible to shew that such was the intention of

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the Legislature. This statute imposes cumulative penalties, but whether the defendant be still liable under Mr. *Gilbert's Act*, it is not for us to decide. It is sufficient for us to say, that this statute is manifestly applicable to every description of parish, whether the parish maintains its own poor separately, or is united with any other parish, I am of opinion that this case is clearly within the statute upon which the action is founded.

Rule discharged (a).

(a) Vide 3 Barn. & Ald. 145. 5 Ibid. 328. 2 J. B. Moore, 187. Ante, Vol. i. p. 397.

Wednesday,
Nov. 27.

Ex parte KITE and Another.

The statute 57
Geo. 3. c. 87.
s. 5. enacts,
that when any
person offend-
ing against the
same, or any
other Act re-
lating to the
customs or ex-
cise, shall be
arrested, he is
to be conveyed
before one or
more Justices
of the Peace
“residing near
to the port or
place into which
the smuggling
vessel is car-
ried, or near to
the place where
any such person

THESE persons having been convicted by two Justices of the Peace for the town and port of *Dover*, of smuggling, were, under the authority of 57 Geo. 3. c. 87. sent on board his Majesty's ship *Gloucester*, for the purpose of serving in his Majesty's navy, during a period of five years. On shewing cause against a rule nisi, obtained on a former day, for writs of habeas corpora, to bring up the defendants to be discharged from their commitment, on the ground that the convicting Justices had no jurisdiction, the facts disclosed were these:—

The defendants were apprehended on the 3d of *October*, in a smuggling boat, whilst they were locally within

“shall be so taken or arrested.” Where two persons were apprehended in a smuggling boat, under this Act, whilst afloat in the port of *F.*, which had an exclusive local jurisdiction, and after being taken on shore and detained two days there, were carried on board again and conveyed into another port, where they were convicted by Justices of another jurisdiction. *Semble*, that such conviction was illegal.

If by the same statute Justices of one local jurisdiction have authority to convict for an offence committed within another, such authority must appear upon the face of the conviction. Therefore, where Justices of the port of *D.* convicted for an offence committed in the port of *F.* which had an exclusive jurisdiction, without shewing on the face of the conviction that they had authority to do so, the conviction was quashed.

the port of *Folkestone*, which port has an exclusive jurisdiction of its own. They were taken, together with the uncustomed goods found in their possession, on shore at *Folkestone*, and confined in a martello tower, until the 5th of *October*, on which day they were put on board the boat again, and carried by water into the port of *Dover*, and taken before two Justices of that town, and by them convicted, under the 57 *Geo. 3. c. 87.* and sent on board the *Gloucester*. The conviction did not shew upon the face of it, that the *Dover* Justices had any jurisdiction over the offence imputed; it stated, as a fact, that the boat in which the defendants were found, was seized in the port of *Folkestone*, but it omitted to shew that *Folkestone* was within the jurisdiction of *Dover*. It appeared from the affidavits, that the town of *Folkestone* is, for all purposes connected with the Customs, within the limits of the port of *Dover*; and that the defendants were necessarily conveyed to the latter town, there being no Customs-warehouse, nor any proper officer appointed at that place, to receive the uncustomed goods seized and brought into the port.

On the part of the defendants, it was stated upon affidavit, that although there was no Customs-warehouse, nor any Custom-house officer appointed at *Folkestone*, to receive uncustomed goods seized in that port, yet, that when such seizures were made, it was the invariable practice to take them to a storehouse, and convey the smugglers before the *Folkestone* Justices for conviction; and that, in this particular instance, application had been made to the Justices of that town, to hear the case; whereupon a day was fixed by them to hear the complaint of the seizing officer, but for some reason, the defendants were conveyed to the town and port of *Dover*, and there convicted. Under these circumstances, the question

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was, whether the Justices of *Dover* had any authority to convict the defendants?

*Jervis* shewed caused. The Justices at *Dover* had jurisdiction to convict in this case; and the question turns upon the statutes 45 *Geo.* 3. c. 121. s. 7. and 57 *Geo.* 3. c. 87. s. 5. By section 7. of the first-mentioned statute, it is enacted, that it "shall be lawful for any officer or officers of the army, navy, marines, customs, or excise, and he and they is and are hereby authorized, empowered, and required to stop, arrest, and detain every such person, and to convey him before one or more of his Majesty's Justices of the Peace *residing near to the port or place into which such ship, vessel, or boat, shall be taken or carried, or near to the place where any such person shall be so taken or arrested,*" &c. The section 5. in the last-mentioned statute is expressed in the same terms. These sections give jurisdiction to two descriptions of Justices; first, the Justices residing near to the port or place into which the boat shall be taken; and second, to the Justices near to the place where the offender shall be taken or arrested. The question then is, whether these men, having been arrested afloat, in a place locally within the limits of the town and port of *Folkestone*, which has an exclusive jurisdiction, and lodged and detained there for two days (*Folkestone* being, for all purposes connected with the revenue of Customs, part of the port of *Dover*, and the vessel seized, being conveyed with these men from *Folkestone* to *Dover*), the Magistrates of the latter town had not jurisdiction to convict for the offence in question. It is not necessary that the conviction should shew that the Magistrates of *Dover* had jurisdiction over the case, inasmuch as the Act of Parliament has given a summary form of conviction which has been pursued; and though it appears on the face of this conviction, that the boat

was seized, and these persons were apprehended in the port of *Folkestone*, yet it does not shew that *Folkestone* has an exclusive jurisdiction, and the Court will not intend that it has, in order to give effect to the objection. The fact being established that *Folkestone* is, for all purposes connected with the revenue of Customs, within the limits of the port of *Dover*, that is sufficient to give jurisdiction to the Justices of the latter place, and therefore this conviction is perfectly correct.

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*Littledale*, contra. This conviction clearly cannot be sustained, unless it appears upon the face of it that the Justices of *Dover* had jurisdiction over this offence. It must either shew that the offence was committed within their immediate jurisdiction, or at all events that their jurisdiction was so connected with the place in which the offence was in fact committed, as to bring the case within their authority. Now, in the first place, it does not appear that this offence was cognisable by the Justices of the town and port of *Dover*, nor in fact that the offence was in any way connected with that place. Nothing can be collected from the conviction itself, from which it can be understood that the offence was committed within the jurisdiction of the Justices of *Dover*, assuming that they had any jurisdiction over the offence, which, it is submitted, they had not, under the circumstances of this case. It is true, that by the statute 47 Geo. 3. s. 2. c. 66. s. 44, if persons are apprehended on the high seas for any offence against the revenue-laws, the Justices of the Peace of any port into which they are taken, shall have the same power, as if the offence had been originally committed within their immediate jurisdiction. But it appears in this case that the original offence was committed within the limits of the jurisdiction of the *Folkestone* Magistrates. The conviction merely



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states that the Justices are Justices acting for the town and port of *Dover*; but it does not state that they are acting for the town and port of *Folkestone*. Surely there ought to be some connexion shewn between the two places, because it cannot be assumed that the Magistrates of *Dover* have a jurisdiction in the town of *Folkestone*. The statement which has been made upon affidavit that *Folkestone* is, for all purposes connected with the Customs, within the jurisdiction of *Dover*, is answered by the fact, that in this very case an application had been made to the *Folkestone* Magistrates to hear the complaint against these persons, and the case would have been disposed of by them, had not the seizing officer carried the alleged offenders before the *Dover* Justice. But, supposing the fact to be, as represented, still it must be shewn that the *Folkestone* Magistrates had no jurisdiction in a matter of this nature. The Magistrates of *Folkestone* have *prima facie* jurisdiction over offences committed against the excise and custom laws, if the offence is committed within their jurisdiction. They have an exclusive commission of the peace, and even the county Justices could not interfere with their jurisdiction, still less the Justices of *Dover*; and the case of *Talbot v. Hubble (a)*, which arose upon 12 *Car. 2. c. 23*, and 15 *Car. 2. c. 2*, is an authority to shew, that where a city has Justices with an exclusive clause, the Justices of the county cannot act in matters of excise. It seems clear, that under the 47 *Geo. 3. c. 66*, the *Dover* Magistrates could have no authority in the case, unless the offence was committed on the high seas. Had this offence been committed on the high seas, and the offenders been taken immediately, and in the first instance, into the port of *Dover*, then the Justices of that port would have had jurisdiction; but here they are apprehended in the port of *Folkestone*,

(a) 2 Stra. 1154.

where there is an exclusive jurisdiction; they are detained on shore for two days, and thence carried to *Dover*. On the face of the conviction it is not shewn that the offence is committed within the jurisdiction of *Dover*; the whole offence is committed within the jurisdiction of *Folkestone*, and the Magistrates of *Dover* have taken upon themselves to make a conviction for which they had no jurisdiction. For these reasons the writs of habeas corpus ought to go.

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ABBOTT, C. J.—Two questions have been raised in this case; first, whether the Justices of *Dover* had in fact any authority to take cognizance of this offence; and, second, assuming them in fact to have that authority, whether the conviction is bad, for not shewing the particular fact upon which their authority was founded. It is provided by 47 Geo. 3. s. 2, c. 66, s. 44, (which recites that doubts had arisen whether Justices could take cognizance of any offence or forfeiture committed on the high seas, and without the limits of the county, city, town, or place in which they acted), “that from and after the passing of this act, in all cases in which any Justice or Justices are empowered to take cognizance of any offence, or of any forfeiture in this act, or in any act or acts of Parliament relating to the revenue or customs of excise, it shall be lawful for any Justice or Justices of the Peace for the county, city, town, or place, within which the port or place into which any ship, vessel, boat, or goods, or any person or persons shall be taken, brought, or carried, under any act or acts of Parliament relating to the revenue of customs or excise, shall be situated, to take cognizance of such offence or offences as if the same had been committed on land within the jurisdiction of such Justices.” It appears from the facts of this case, that the persons who are applying for these writs, were taken on board a vessel having contraband goods, in the harbour of

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Folkestone, and, in the first instance, the vessel was secured in that harbour. The parties were then taken on shore, within the limits of the local jurisdiction of *Folkestone*. After remaining in custody there for two days, there were again put on board the vessel and carried into the port of *Dover*. The case is then submitted to the Justices of *Dover*, and they convict the parties. The state of facts raises this question, namely, whether offenders of this description, being apprehended in a port on the water, and they and the vessel are voluntarily carried (not by any stress of weather) within the limits of a particular jurisdiction, and are lodged there, may be put on board again, and taken into any other port for the purpose of conviction. It would be very obvious, that if that can be done, it may lead to very considerable abuse; for, if instead of taking these persons and the vessel into the port of *Dover*, in the first instance, as by law they might have been taken, they are taken in the first place into another port, and afterwards removed thither, it is very difficult to say that they might not be taken to any port at the extremity of the coasts of this kingdom, to the west or to the north. It is difficult to say that that might not be done. Therefore, if it were necessary to pronounce any opinion upon that question, I should say, as at present advised, that the inclination of my opinion would be against such a construction of the statute. But I do not think myself called upon to give any decisive opinion upon that question, which should be binding upon myself or upon any other person, who may be called upon hereafter to give judgment upon it; and if ever I should be called upon hereafter to re-consider the question, my mind will be unbiassed upon it. I am however clearly of opinion, notwithstanding the form of conviction given by the 57 Geo. 3. that it is necessary it should appear upon the face of the con-

viction, that the convicting Magistrates had authority and jurisdiction over the subject-matter of their decision. The form given by the statute begins first with the county, &c. as the case may be;—"Be it remembered," &c. Then directions are given to state the offence. The question then is, whether, when the offence comes to be stated, the place wherein it was committed—the county, riding, city, or liberty, &c. must not be stated; and if that is not done, whether the particular fact which gives the Justices authority beyond the county, riding, or place, &c. to which their jurisdiction extends, must not be stated? It is one of the first principles of the criminal law, as it regards proceedings before Justices of the Peace, and also in any other cases, speaking generally, that it should appear upon the face of the adjudication that the Magistrates had authority and jurisdiction over the subject-matter of their consideration. That is the very first principle in criminal law. If we were to hold under this particular form of conviction, that it was unnecessary to do that, in order to give effect to this Act of Parliament, we should be repealing, if I may so express myself, that general and almost universal principle to which I have alluded. Looking to the form of this conviction, it appears to have been prepared without adverting to the particular circumstances of the case. Undoubtedly cases may arise, in which Justices of the Peace have authority beyond that place to which the precise terms of their commission extends. If we assume (and we do assume it) that the Legislature intended that a conviction, in the form given by the statute, might be good to authorize Justices of the Peace in one county to convict for an offence committed in another, we should, at least, require the Justices to shew, upon the face of their conviction, that they had such a jurisdiction. For instance, suppose Justices of the Peace for the county of *Kent* were to

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convict for an offence under this act, committed at *Hastings* or *Brighton*, in *Sussex*, we should hold such a conviction to be bad, unless it was made certain that they had jurisdiction over an offence so committed. Under some circumstances the Magistrates of one town or borough, and even in a county, have jurisdiction over offences committed within the local limits of another town, borough, or county; but if it is meant to rely upon the precise fact which gives the jurisdiction, that fact must be mentioned, in order that it may appear upon the face of the conviction under this act, as it must by law appear upon the face of all convictions, speaking generally, that the Justice has jurisdiction over the subject-matter. Without therefore giving any judgment upon the other question which has been raised, I am of opinion, that assuming the authority to convict in this particular case, the conviction is bad, for not setting forth that special fact, namely, that the Justices of the Peace for the town and port of *Dover* had jurisdiction to convict for an offence committed in the port of *Folkestone*.

BAYLEY, J. and HOLROYD, J. were of the same opinion.

BEST, J.—It appears to me, that the objection arising on the face of this conviction, upon which my Lord Chief Justice has declined giving any decided opinion, arises from the difficulty in which the Magistrates found themselves. Previously to the passing of the statutes, which have been mentioned, Magistrates had no authority to convict for offences on the high seas. We must look therefore to the statutes themselves, to see what authority they give to the Justices. These Acts of Parliament must be construed strictly, in considering a case which places these persons in a situation of so much peril. In

such a case every principle of law should be strictly pursued and observed. Now it appears to me, that when an offence under this act is committed on the high seas, out of the limits of the ordinary jurisdiction of the Justices, and the party is conveyed before a Justice residing *near to the port or place into which the vessel shall be carried*, that must mean the port or place into which the vessel is *first* brought. I do not mean first brought by stress of weather, and when the vessel gets out again to sea without landing, but the port or place where the offender is first landed, and may be brought to justice. If that part of the 5th section of 57 Geo. 3. c. 87, does not mean "first brought" in the sense I have mentioned, I do not know why the officer of the Customs might not take the party to two, three, or even five different ports, in order to find some Magistrate more favorable to his views than any other. Such a discretion ought not to be recognized. It appears to me to be an extremely dangerous discretion, more particularly in a case so highly penal as this, where a man is to be deprived of his liberty, perhaps for a period of five years, without the intervention of a Jury.

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Rule absolute.

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Thursday,  
Nov. 28.

## The KING v. GEORGE WEBB HALL.

The Courts of Requests Act, 26 Geo. 3. c. 38. s. 8. declares that no person shall be capable of acting as a Commissioner in the execution of any of the Acts for constituting such Courts, unless such person shall be a *householder* within the county, &c. for which he shall act. The word "householder" in this Act, does not mean a personally resident housekeeper, and therefore, where a person had been elected to the office of Registrar and Clerk of the Court of Requests of the city of *Bristol*, by a majority of householders, paying rent, rates, and taxes, and resident by their partners in trade or their servants only: Held, that the election was valid.

**T**HIS was an information in the nature of a *quo warranto* against the defendant, calling upon him to shew by what authority he exercised the office of Registrar and Clerk of the Court of Requests of the city of *Bristol*. At the trial before *Graham, B.*, at the *Bristol Summer Assizes*, 1819, a verdict was found for the Crown, subject to the opinion of the Court, upon a special case.

The office of Registrar and Clerk of the Court of Requests in the city of *Bristol*, having become vacant by the death of a gentleman named *Bengough*, an election took place on the 2d *May*, 1818, to supply the vacancy. On that occasion thirteen persons attended and gave their votes, eight for the defendant, and five for Mr. *Palmer*, another candidate. The eight who voted for the defendant were *Levi Ames*, *Michael Castle*, *George Hilhouse*, *William Fripp*, *William Fripp the younger*, *Levi Ames the younger*, *Edward Brice*, and *James George*. The question for the opinion of the Court was, whether these persons were *householders* within the meaning of the Courts of Requests Acts, 26 Geo. 3. c. 38. s. 8., by which it is enacted, "that after the 24th of *June*, 1786, no person shall be capable of acting as a Commissioner in the execution of any of the acts for constituting such Courts, unless such person shall be a householder within the county, district, city, liberty, or place, for which he shall act, and shall be possessed of a real estate of the annual value of 20*l.* or of personal estate of the value of 500*l.*" It was admitted, that if any five of the persons, who voted for the defendant, should be adjudged householders

within the meaning of this statute, the judgment of the Court should be pronounced in his favor. The case set forth, with great particularity, the qualifications in respect of which each of these persons claimed the right of voting as a householder. It appeared, in substance, that each was a partner in a firm carrying on trade in *Bristol*; that each was the holder of a dwelling-house there, and paying rates and taxes in respect thereof; that each, either by a partner or a servant, occupied and slept in the house; that each was in the daily habit of resorting to the dwelling-house, or some other building connected with it, for the purposes of business; that each was a person of substance and respectability; that none of them personally slept on the premises, in respect of which they respectively claimed the right of voting; and that each had a dwelling-house out of the city of *Bristol*, in which they respectively slept and resided.

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On a former day the case was argued by *Selwyn*, for the Crown, and *Adam*, for the defendant.

For the Crown it was contended, that the word "householder," as used in the statute 26 Geo. 3. c. 38. s. 8, meant "the master of a family," who was domiciled by personal residence and occupancy in the house held by him, and consequently that none of these persons were qualified to vote for the defendant. The authorities cited were *Johnson's Dictionary*, where "householder" is called "master of a family;" *Tomlin's Law Dictionary*, where it is said "Householder (*pater familias*) is the occupier of a house, a housekeeper, or master of a family;" 2 *Inst.* 702; *Rex v. Barwick* (a), *The Overseers of Weobly* (b), *Mayor of Colchester v. Goodwin* (c), *Waller v. Hanger* (d),

(a) 7 T. R. 33.

(b) 2 Str. 1261.

(c) Carter, 114.

(d) 3 Bulstr. 14.



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*The Mayor of London v. The Mayor of Lynn* (a), *Stephens v. Derry* (b), *Rex v. Nicholson* (c), *Rex v. Jones* (d), and *Hemming v. Plenty* (e). Reference was also had to the 22 Geo. 2. c. 47. 23 Geo. 3. c. 27. 3 Geo. 2. c. 25. s. 19. and 23 Geo. 2. c. 30. and to 1 Hargr. L. T. 128. and 7 Bro. P. C. Tomlins' edit. 131. 134.

For the defendant the following arguments were urged: The construction endeavoured to be put upon the word "householder" is by no means warranted either by the authorities cited, or by common usage and parlance. It may, perhaps, on some occasions, bear the sense attributed to it; but, generally speaking, it imports only the keeping a house for the purposes of trade, without any necessary implication of personal residence. It is attempted to support the definition contended for, by giving to the word "householder" the extensive use and meaning of the word "household;" but this is by no means a reasonable conclusion: the two words import very different meanings, and describe very distinct situations; the first defines an individual person; the last is a noun of number, and there is no sort of analogy existing between them. The object and intention of the Legislature, in imposing this qualification, was no more than that the electors should be persons connected with the interests of the city, familiar with its customs and affairs, associating and transacting business with its citizens, and well known in it as men of respectable characters and responsible situations. All these qualifications are eminently conspicuous in the persons who have voted for the defendant in this case, and they are sufficient to legalize their votes, and to satisfy the requisites of the statute. If these electors are not qualified on account of their non-residence, no qualified electors

(a) 1 Bos. &amp; Pul. 487.

(b) 16 East, 147.

(c) 12 Ibid. 330.

(d) 8 East, 450.

(e) 1 J. B. Moore, 529.

can be found; for, in modern times, it has become an almost universal habit for the most respectable and wealthy traders, in all great and commercial towns, to live out of those towns, though they daily resort to them for the purposes of business, and in no one place does that habit prevail more generally than at *Bristol*. It is expressly declared by Lord *Coke*, in his *Commentary on the Statute of Bridges*, that a person in possession of a house, occupied merely by his servants, is liable to pay the rates assessed upon it(a); and surely if such an occupation makes a man a householder, so far as his liabilities are concerned, it ought to have a similar effect as respects his privileges. In the statute 26 *Geo. 3. c. 100. s. 2*, which regulates the right of voting at elections of Members of Parliament, there is this expression to be found, “inhabitants householders residents,” as one joint description; the inference from which is conclusive, that there may be “inhabitants householders,” who are not “residents,” and that neither of the two former words includes residency. So, in the statute 11 *Geo. 1. c. 18. s. 10*, it is provided, that partners carrying on trade in one house, as *householders*, for the rates of which they are jointly liable, shall vote at elections for the mayor and aldermen of *London*, while the next section enables two persons *inhabiting* in the same house to vote, clearly shewing that a householder was not, in the view of the Legislature, a person “inhabiting in,” or resident in, a house. So, in the case of *Rex v. Barwick (b)*, Lord *Kenyon* expressly lays down a distinction between “occupancy” and “inhabitaney.” It is an admitted fact in the case, that all these parties were liable to, and actually paid, parochial rates upon the houses in which it is contended they are not the *holders*. Upon what principle have they paid those rates? Would it have been a good answer to a

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(a) 2 *Inst.* 702.(b) 7 *T. R.* 33.

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demand of those rates, to say, "I am not the householder, I am only a housekeeper; I only occupy by means of a servant, or a partner, and therefore I am not liable?" The absurdity attendant upon the argument refutes it. It is a householding sufficient to impose the burthen, and there is no reason, and no law, that can prevent its also conferring the privilege. The cases brought forward on the part of the Crown, are all distinguishable mainly from the present, as might be easily shewn; but there are other cases directly in point, and affirmative of the defendant's case. It is said by Lord *Ellenborough*, in *Bertie v. Beaumont* (a), that the occupation of a servant is the occupation of the master; and he refers to a previous case of *Rex v. Stock* (b), where it was decided, that a burglary being committed in premises belonging to three partners, and occupied by their joint servant, it was well laid as committed in the dwelling-house of the partners. As respects the equity of this case, and the intention of the Legislature, there can be no doubt that both are fully satisfied in the persons of the electors, who are now objected to; and upon a fair construction of the word "householders," and an impartial view of all the legal decisions upon similar questions, there can be as little doubt, that in point of law the defendant has been well elected, and is entitled to the judgment of the Court in his favor.

The Court took time to consider the case, and judgment was now delivered by

ABBOTT, C. J.—This case came before us on an information, in the nature of *quo warranto*, against the defendant, calling upon him to shew by what authority

(a) 16 East, 33.

(b) 2 Taunt. 339.

he held and exercised the office of Registrar and Clerk of the Court of Requests of the city of *Bristol*. In answer to the information the defendant set forth his election, and issue was joined upon the question, whether he had a majority of votes, that is, of good votes. It appears by the case, that so far as a numerical majority went that issue was found for the defendant; but a question arose, whether those votes were substantially and legally good, which question now remains for our decision, and depends entirely upon the construction of the word "householders," as used in the statute 26 *Geo. 3. c. 38*. By the statute 1 *W. & M.* the mayor, aldermen, and common council of the city of *Bristol*, were appointed Commissioners of the Court of Requests of that city. In that statute the official corporate character was the only qualification required. Many Acts of Parliament for the establishment of other similar Courts had passed previous to the 26 *Geo. 3*. The latter is a general law, and must be understood, with reference to the Court of Requests at *Bristol*, to have superadded the qualification of "householders," whatever may be its bearing upon the qualifications before required. Now, the true meaning of particular words in particular Acts of Parliament is to be found, not so much in a strict etymological propriety of language, nor in popular usage, as in the subject-matter of the occasion in which they are used, as connected with the subject which is sought to be attained. The meaning of the word "inhabitants," in the Statute of Bridges, 22 *H. 8. c. 9*, which was cited in the course of the argument, affords an illustration of the proposition very applicable to the present case. That statute speaks of the inhabitants of any county, city, or other place. Taking that word either in its strict or its popular sense, it is there applied to those persons only "who have a dwelling herein," and all persons who have a dwelling therein are

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there spoken of as "inhabitants thereof." But the object of that statute being to raise a fund for the repairs of the bridges in the county, by the taxation of persons in reasonable proportions to their property therein, or (in case of refusal) to enforce the payment of such tax by distress on the lands, goods, or chattels of the persons rated, the word "inhabitant" has there been held to include all the *occupiers* of land in the county, although not actually *dwelling* in the county. The object of the statute 26 Geo. 3. c. 38, however, is very different. That seems to have been to unite respectability of character, and competency in circumstances, in the place where the office is to be exercised, with notoriety in, and habits of access and resort to it. This object is attained by excluding lodgers and inmates, and persons who have no permanent connexion with and resort to the place. The word in this statute is "*householder*," not "*housekeeper*." The word "*householder*," in whatever sense taken, would certainly exclude the classes I have mentioned, and probably some others, as not being in the strict sense of the word "*housekeeper*." It is sufficient for the purpose of this cause, if five of those who have voted for the defendant, and whose right to vote is disputed, shall be found to be householders within the true meaning of the statute; and we are of opinion that five, namely, *Levy Ames*, *Michael Castles*, *George Hilhouse*, *William Fripp*, and *Edward Brice*, are such householders. Each of these persons is a partner in a firm carrying on trade in *Bristol*, or a holder of a dwelling-house there; each of them, either by a partner or a servant, occupies and sleeps in the house, and each is in the daily habit of resorting to that dwelling-house, or some other building connected with it, for the purposes of business. In the first case, that of *Levy Ames*, the dwelling-house belonging to him is annexed to the pre-

mises where the business of his firm is carried on, and is occupied by, or in the care of a clerk of that firm. In the two succeeding cases, the parties carry on business in a warehouse adjoining a dwelling-house, held by the firm, and occupied by a servant, and in all these cases the rents, rates, and taxes are paid by the firm. In the case of Mr. *Fripp* and Mr. *Brice*, they are partners in a banking-house, which they occupy in the way of their trade, and behind which there is a dwelling-house belonging to the firm, and for which the firm pays the rates and taxes. So that in every one of these five cases there is a dwelling-house belonging to, or rented by the partnership, and annexed to premises in which the partnership business is conducted, and occupied either by servants, or partners of the firm, as a dwelling-house. Under these circumstances we are of opinion that each of these parties is to be deemed a householder within the meaning of this statute, and it is therefore unnecessary to say any thing respecting the other three persons who voted for the defendant. It must be obvious to every man who has the slightest knowledge of the habits of the more respectable classes of the trading world in all the great towns in *England*, that an exclusion of persons in the situation of these gentlemen would operate as an exclusion, both in this and many other cases, of a very large portion of those very persons, who are in all respects best qualified for the discharge of those duties, which form the subject of the present inquiry. For these reasons, we are of opinion that we are bound to give our

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Judgment for the defendant.

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Monday,  
Nov. 18.

## The KING v. The JUSTICES of CUMBERLAND.

It was enacted by a private Inclosure Act, that the accounts of the Commissioners, relating to expenses incurred by them in the execution of the same, should not be binding on the parties concerned, unless such accounts were duly allowed by a Justice of the Peace, in the manner therein prescribed; and by another section, an appeal was given "to the party aggrieved, by any thing done in pursuance of this Act or the General Inclosure Act,"—except as to such determination as were, by the Local or General Inclosure Act, declared to be binding, final, and conclusive: Held, that the allowance of the accounts by a single Justice, did not fall within this exception, so as to take away the right of appeal against his determination.

**COPLEY**, S. G. moved for a certiorari to bring up an order of the *Cumberland* Sessions, touching the allowance of expenses incurred by Commissioners under a Local Inclosure Act, for the purpose of having it quashed, under the following circumstances:—An Act of Parliament had passed in the 50 *Geo.* 3. for inclosing certain lands in the parish of *Gorforth* in *Cumberland*, and after reciting the General Inclosure Act, 41 *Geo.* 3. c. 109, proceeded to enact, "that once at least in every year, during the execution of this act, the Commissioners shall, and they are hereby required to make a true and just statement or account of all monies by them received and expended, or due to them for their own trouble and expenses in the execution of this or the said recited act. And such statement and account when so made, together with the vouchers relating thereto, shall be by them laid before one of his Majesty's Justices of the Peace for the said county of *Cumberland* (not interested in the said inclosure) to be by him examined and balanced; and such balance shall be by such Justice stated in the book of accounts to be kept in the office of the clerk of the Commissioners; and no charge or item in such accounts shall be binding upon the parties concerned, or valid in law, unless the same shall have been duly allowed by such Justice." By another section of the act,

it was enacted, that "if any person shall think himself aggrieved by any thing done in pursuance of this act or the said recited act, (other than and except such determinations as are by this or the said recited act, declared to be binding, final, and conclusive; and except in such cases where an issue at law is authorised to be tried,) then he may appeal to the General Quarter Sessions of the Peace to be holden for the said county, &c." The Commissioners acting under this statute having made allotments by virtue thereof, prepared an account of sums of money expended by them, in carrying the same into effect, and in pursuance of the first-mentioned clause, submitted it, together with the necessary vouchers, to the approval of a Justice not interested in the inclosure, by whom it was allowed in the manner required by the act. Certain persons interested in the inclosure, being dissatisfied with the accounts, appealed against the allowance of the same at the last *Midsummer* Sessions. On the part of the Commissioners, it was contended that the Quarter Sessions had no jurisdiction to entertain the appeal, but the Sessions over-ruled the objection, and made an order, by which they disallowed several items mentioned in the account, as allowed by the single Justice.

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It was now contended that such an order ought not to have been made, and must therefore be quashed when returned to the certiorari. The clause in this act, relating to the accounts of the Commissioners, it is true, does not state in express terms that such accounts shall be binding and conclusive upon the parties interested, when balanced and allowed by the single Justice, but this must necessarily be inferred, because the enactment, declaring that the accounts shall not be binding *until allowed*, is in substance, that they shall be binding and conclusive, *when*



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*allowed.* Beside which, the appeal clause excepts those determinations which are, by the Local or the General Inclosure Act, recited, declared to be binding, final, and conclusive; and it is to be observed, that in this act there is no clause to which such exception can be applied, unless it is held applicable to the allowance by the single Justice. This argument was recognized and acted upon in *Rex v. The Commissioners of Dean Inclosure* (a). In the present case the statute directs the allowance of the accounts to be by a single Justice, and the case of *Boyfield v. Porter* (b) is an authority for saying that his decision shall be conclusive.

ABBOTT, C. J.—I am of opinion that we ought not to grant the certiorari. It appears to me that we are not at liberty, merely by inference, to defeat the operation of the clause in this act which gives an appeal in certain cases. I cannot find in the act, any positive declaration that the allowance of the accounts by a single Justice, shall be “final, binding, and conclusive.” Those words, in the excepting part of the appeal clause, must, as it appears to me, be confined to those proceedings which are made binding, final, and conclusive, by some affirmative enactment in the statute. I can find no such affirmative enactment in the statute applicable to the matter in question. We are called upon to give effect to such a provision merely by inference, which I think we are not at liberty to do. The whole of the argument is bottomed merely upon inference. Under such circumstances I am clearly of opinion the Sessions had jurisdiction, and properly heard the appeal.

(a) 2 Maul. &amp; Selw. 80.

(b) 13 East, 200.

HOLROYD, J. and BEST, J.(a) were of the same opinion.

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Rule refused.

(a) Bayley, J. was absent.

The KING v. The INHABITANTS of PENEGOES and  
MACHYNLLETH.

Tuesday,  
Nov. 26.

**T**HIS was an indictment against the defendants, for not repairing a bridge in the county of *Montgomery*; the defendants having been found guilty and received judgment at the Sessions.

After conviction and judgment at the Sessions, the Court will not grant a certiorari to remove the proceedings for the purpose of having an indictment quashed on motion for error on the record.

Sir *William Owen* now moved for a certiorari, to remove the indictment into this Court, for the purpose of having it quashed for several errors on the record. He referred to *Regina v. Dixon* (a), *Rex v. The Inhabitants of Oxfordshire* (b), and *Rex v. Nichols* (c).

ABBOTT, C. J.—I am clearly of opinion, that this is not a case in which we ought to grant a certiorari for the purpose mentioned. There have been cases, I believe, in which the Court has granted a certiorari to remove convictions, and the judgments found thereon, for the pur-

(a) 1 Salk. 150. S. C. 6 Mod.  
61. S. C. 2 Ld. Raym. 971. S. C.  
3 Salk. 78.

(b) 13 East, 411.

(c) Id. 412. n. (a).

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pose of enforcing them; but those were cases moved at the instance of the prosecutor; and there may be many cases in which that would be a very proper course of proceeding. Here, however, the application is at the instance of the defendant for a certiorari, to remove the proceedings after conviction and after judgment, for the purpose of having the indictment quashed; which is in effect an attempt to obtain the advantage of a writ of error without the expense of it. There may be cases in which the Court has granted a certiorari before judgment, but it must be in the discretion of the Court, whether, after judgment, we will allow a certiorari, in order that that the indictment may be brought before us, to have it quashed. We think this is not a case in which such a discretion ought to be exercised in favor of the defendant. The regular and ordinary course is, to bring a writ of error; and we cannot upon motion do what may be done by a Court of Error. The cases which have been cited do not warrant this application. Why did not the defendants apply to the Court before the prosecutor was suffered to incur the expense of a trial? This is a motion to save the expense of a writ of error by motion only, which cannot be allowed; for if we were improperly to quash the indictment, the prosecutor would have no remedy. The defendant must bring a writ of error if he is so advised.

HOLROYD, J. (a)—Said, he remembered a case from *Yorkshire*, where there was an application to remove the indictment after conviction, but he was not certain whether it was before judgment. He believed, however, that judgment was afterwards given in this Court, and that the

(a) Bayley, J. was absent.

proceedings had been removed for the purpose of enforcing the conviction. Where the object is to annul the proceedings, the regular course is, to bring a writ of error; and as there is nothing in this case to take it out of the ordinary course, a certiorari ought not to go.

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BEST, J.—Concurred.

Certiorari denied.

The KING v. The INHABITANTS of HENDON.

Thursday,  
 Nov. 28.

ON the 9th *April*, a poor-rate was made upon the inhabitants of *Hendon*, was allowed on the 11th, and published on the 14th of the same month. On the 15th the *Middlesex* Sessions commenced, but certain individuals, who had intended to appeal against the rate, did not enter their appeal until the next succeeding Sessions, when the Justices refused to receive it, on the ground that it ought to have been entered at the Sessions immediately next after the making of the rate; and on motion for a mandamus to the Justices to enter continuances and hear the appeal,

A poor-rate having been made on the 9th, allowed on the 11th, published on the 14th, and the Sessions commencing on the 15th of *April*:—Held, that an appeal against the rate need not be entered until the Sessions next but one after the publication of the rate.

The Court was of opinion, on the authority of *Rex v. The Justices of Sussex(a)*, that the mandamus ought to go. The next Sessions meant the next practicable Ses-

(a) 15 East, 206.

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sions at which an effectual appeal could be lodged after the allowance and publication of the rate. The publication in this case was so close to the next Sessions, that it was impossible for the defendants, with any reasonable expedition, to avail themselves of the right of appeal.

Rule absolute.

Bollund, for the Crown; *Andrews*, for the defendants.

END OF MICHAELMAS TERM.

C A S E S
 IN THE
COURT OF KING'S BENCH,
 FOR THE USE OF
Justices of the Peace.

HILARY TERM, 1823.

The KING v. THOMAS POYNDR the Elder.

1823.

Thursday,
Jan. 23.

INDICTMENT against the defendant, for refusing to take upon him and execute the office of overseer of the poor of the parish of *St. Ann, Blackfriars*, in *London*, to which he had been lawfully nominated by two Justices of the Peace. Plea, Not Guilty, and Issue thereon. At the trial, before *Abbott*, C. J. at the *London* adjourned Sittings, after last Term, it appeared in evidence that the defendant occupied a dwelling-house, yard, buildings, and premises, in *Earl Street*, in the parish of *St. Ann, Blackfriars*, to which he and his partner in trade, as lime merchants, were rated to the relief of the poor, and were liable to all other taxes levied on housekeepers. The only person who slept upon the premises was the managing clerk or agent conducting the business of the firm, and he resided in the dwelling-house attached to the premises. The defendant and his partner resided entirely in the country, distant from the parish in question, and resorted to the establishment in *Earl Street* for the purposes of business only. It was proved, that the defend-

A person occupying a house in one parish by means of a clerk only, and paying rent, rates, and taxes, but sleeping in another parish, is a *substantial householder*, and liable to serve the office of overseer of the poor in the first mentioned parish.

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ant had exercised the privilege of a householder by voting at the election of the rector, who, by custom, is chosen by the inhabitant householders of the parish in question. Under these circumstances the question was, whether the defendant was a substantial householder, within the meaning of the statute 43 *Eliz.* c. 2, and the several other statutes relating to the appointment of overseers of the poor. The learned Judge reserved the question, and a verdict of Guilty was recorded, subject to the opinion of the Court as to the defendant's liability to serve the office.

Denman, C. S. now moved for a rule to shew cause why the verdict of guilty should not be set aside, and a new trial granted. In order to cast upon the defendant the liability of serving the office of overseer, it must be distinctly shewn that he is a substantial householder, domiciled in the house in respect of which he has been appointed to serve. If these qualifications be necessary to satisfy the definition of a substantial householder, it is quite clear that this defendant is not liable, the fact being, that he resorted to the lime wharf and premises connected with it, merely for the purposes of his trade, and never slept upon the premises in his life. After the case of *Rex v. Hall(a)*, decided last Term, there is certainly some difficulty in establishing the proposition now contended for, because, if the Court should be of opinion that a non-resident householder, who enjoys the privileges resulting from that character, must also bear the burthens attached to it, this case must be governed by that decision. But the inconvenience which such a decision would produce must be so obvious, that the Court will pause before they pronounce that this case must be governed by *Rex v.*

(a) Ante, p. 232.

Hall. In that case the question was, whether a householder paying rent, rates, and taxes, and resident only by his partners or servants, might give his vote at the election of the Registrar and Clerk of a Court of Requests. The Court, referring in that case to the policy of the Court of Requests' Act, certainly held, that a householder, under such circumstances, was privileged to vote for such an office. But here a very different principle must govern their decision. They must look to the nature and character of the office of an overseer of the poor. Looking through the whole of the Poor Laws, residence seems to be considered as an essential requisite to qualify persons to fill that office, and for this reason, that they may be acquainted with the affairs of the parish, and conversant with its interests. The Legislature never could intend that this burthensome office should be imposed upon a man who happened to be the tenant of a house in a parish, but personally resident in a different parish. If mere tenancy was the criterion, this defendant might be called upon to serve the office in every parish in which he happened to be the holder of premises; and this absurdity would follow, that he might be appointed to the same office in two parishes during the same year. The case against the defendant cannot be carried farther by the late statute 59 Geo. 3. c. 12. s. 6, because the facts do not bring it within the operation of that clause. By that statute it is enacted, that "a person who shall be assessed to the relief of the poor of any parish, and shall be a resident within two miles from the church or chapel of such parish, may be appointed to be an overseer of the poor thereof, although such person so to be appointed shall not be an householder within the parish of which he shall be so appointed an overseer of the poor." The object of that statute clearly was no more than to impose the liability upon persons assessed to the relief of the

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poor, though not householders, provided they dwelt, even as lodgers, within two miles of the church or chapel. The defendant certainly does not fall within the scope of that statute, because his personal residence is more than two miles from the church of *St. Ann, Blackfriars*. The duty which an overseer is called upon to discharge is of a personal nature, and cannot be performed by deputy, and therefore necessarily imports personal residence. The only question then is, whether the defendant, who is alleged in the indictment to be an householder, and residing within the parish of *St. Ann*, is, under the circumstances of the case, 'to be deemed so to be, within the purview and true intent and meaning of the statutes relating to the appointment of overseers. The word "householder" does not appear by any of the adjudged cases on this subject to have been judicially defined, but both *ex vi termini* and by its common acceptation, it clearly signifies a "house-dweller, house-keeper, or person inhabiting a house as his regular domicile." *Dr. Johnson* defines it to be "a master of a family." *Bayley* interprets it "master of a house or family." The defendant certainly does not answer this description. As far then as etymology goes, the defendant is not a substantial householder, and therefore the Court must look to the reason of the thing, in order to decide the question of his liability to serve the office sought to be imposed upon him by this prosecution. As far as the authorities go, they seem to consider residence as an essential qualification. For instance, it is said in *Gibson's Codex*, upon the subject of the office of churchwarden, "that no person living out of the parish, although he occupies lands within the parish, may be chosen churchwarden (who by the 43 *Eliz.* c. 2. is declared to be an overseer), because he cannot take notice of absences from church, nor disorders in it for the due presentment of them."

In the case of *Rex et Reg. v. Moore* (a), the defendant, who was a citizen of *London*, having a country house at *Hornsey*, where he usually dwelt in the summer season, was chosen overseer of the parish of *Hornsey*, and being discharged on appeal to the Quarter Sessions, the order for such discharge, and for choosing another in his stead, was removed by certiorari into this Court, when the Court confirmed the order, and added, that they discountenanced a parish choosing a man to be overseer, who was resident there only part of the summer, and who was actually an inhabitant of a parish in *London* (b). From this it should seem that personal residence is necessary to constitute a householder within the meaning of the statute. Another test of this definition may be resorted to, in considering whose dwelling-house this could be laid to be, in cases of felony. It seems to be quite clear that it could not be described as the dwelling-house of the defendant, but must be laid to be that of the clerk, who slept in it. For this, *Rex v. Rogers* (c), *Tracey v. Talbot* (d), *General Gansel's case* (e), *Canoll's case* (f), *Turner's case* (g), *Trapsham's case* (h), are authorities. The case of *Rex v. Margetts and others* (i), is precisely in point upon this part of the case, for there the Court were clearly of opinion, that if a burglary be committed in the warehouse of a trading company, in the house belonging to whom an agent of the company resides with his family, for the purpose of conducting the business, it may be laid to be the dwelling-house of the agent, although the rent is paid, and the lease is held

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(a) Carth. 161.

(b) Vide Com. Dig. Vol. iv. tit. Justice of Peace, B. 64. Hammond's edit. where this authority is recognized as law.

(c) 1 Leach. Cro. Cas. 89. S. C. 2 East, 506.

(d) 2 Salk. 532.

(e) Cowp. 4.

(f) O. B. February, 1782.

(g) O. B. February, 1784.

(h) O. B. August, 1786.

(i) 2 Leach. Cro. Cas. 930.

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by the company; and they said it would be doing an equal violence to language and to common sense to consider it as *their* dwelling-house, especially as it was evident that their only object in holding it was, to furnish a residence for their agent, and ware-rooms for their commodities; that the punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose, but that it would be absurd to suppose that that terror, which is the essence of the crime, could, from the breaking and entering in that case, have produced an effect at *Witney*, in *Oxfordshire*, where the company resided (a). These authorities therefore go to shew, that in the case of an indictment for burglary, the defendant's clerk would be considered as the householder, and consequently that the law contemplates an actual and not a constructive possession and residence. This case is not to be considered with reference to the custom of *London*, but the Court are to decide whether the defendant is a householder within the meaning of the Act of Parliament. They must construe this with a view to the intention of the Legislature at the time the statute was passed, and cannot put a forced construction upon this question, which a change of times and circumstances in the occu-

(a) In that case reference is had to the case of *Rex v. Stock and Edwards*, at *Carlisle Summer Assizes*, 1809, and also to the note of a case of burglary in *Haberdasher's Hall*, *London*, inhabited by Mr. Knapp, clerk to the *Haberdasher's Company*, in which latter case the Court held it to be Mr. Knapp's house. These decisions were recognized at *Hertford Summer Assizes*, 1822, in *Rex v. Joseph Giffin*, who was indicted for a burglary in a house on the *Stort Navigation*, at *Cheshunt*, the property of the trustees of such navigation, occupied by the prosecutor, as their sluice-gate-keeper. It was objected for the prisoner, that the house could not be laid as the dwelling-house of the prosecutor, he being merely the servant of the trustees, and liable to be turned out at a moment's notice; but *Park, J.*, over-ruled the objection, on the authority of the cases above mentioned, and the prisoner was convicted. MS.

pation of houses in *London* by trading companies, might induce. If this defendant is not a substantial householder within the meaning of the statute of *Elizabeth*, and the subsequent statutes, he is clearly not liable under this indictment (a).

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ABBOTT, C. J.—The question raised in this case was brought under our deliberate consideration in the case of *Rex v. Hall*, and I may venture to say, that when we conferred together upon that occasion, we were not insensible to the distinction attempted to be drawn between the privileges and burthens attached to the character of householder. We thought that such a distinction could not be established; for we were clearly of opinion, that as the parties interested were liable to the burthens entailed upon them in respect of their occupation as householders, they had also a right to enjoy the privileges which such an occupation conferred upon them. That principle applies to the defendant in this case. This defendant, though he did not reside in the parish of *St. Ann*, yet, as a householder, he enjoyed the privilege of voting for the rector of that parish, who is, by custom, chosen by the inhabitant householders. Therefore, as he enjoys the privileges, I am of opinion that he is liable to the burthens of a householder, and consequently is bound to serve this office. My mind is so well satisfied upon the point, that I think there is no necessity for farther discussion.

BAYLEY, J.—I am of the same opinion. No objection can arise from the circumstance of the defendant

(a) Vide 14 Eliz. c. 5. 18 Eliz. c. 3. 39 Eliz. c. 3. 43 Eliz. 3. c. 2. 54 Geo. 2. c. 91, and 59 Geo. 2. c. 12. *The Queen v. Searle*, 1 Bott. 3, 4. *Rex v. Weobley*, in *Herefordshire*, 2 Stra. 1261. 1 Nol. P. L. 49. See also the cases decided upon this subject in the Ecclesiastical Courts, collected in 1 Haggard's Consistory Reports, 368, et seq.

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being an inhabitant householder in another parish, and certainly no prejudice can be sustained by him in that respect from his liability to serve the office there; because, suppose he should happen to be appointed to the office in the two parishes during the same year (which is not very likely) he might appeal against the order, and he would then be put to his election in which parish he would serve. He cannot serve in both at once, but he may serve in each successively. The question here is, who is the tenant of the house. The defendant clearly is the tenant, and therefore he is a householder, and answers the description of a *substantial* householder. If gentlemen of fortune and wealth, and who can afford to reside at a country house, and at the same time occupy a warehouse in *London* merely by a clerk or servant, are to be exempted from parish offices, a great hardship will be imposed upon the unfortunate few who cannot keep their country houses, but are obliged to remain inhabitants of the city. A very large number of houses in this great metropolis are merely occupied by clerks or servants, but that is no reason why their owners should not be called upon to discharge those duties which fall upon other householders.

HOLROYD, J. and BEST, J. concurred.

Rule refused.

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Friday,  
Jan. 24.

## REX v. The INHABITANTS of COTESBACH.

**T**HESE defendants were indicted at the last Assizes for the county of *Leicester*, at the instance of another parish, for not repairing a road in the parish of *Cotesbach*, in that county. The defendants withdrew their plea of Not Guilty, and pleaded Guilty, subject to the award of arbitrators indifferently chosen, upon the question of their liability to repair; and the arbitrator having decided that they were liable, and made their award to that effect,

This Court will not entertain an application for setting aside an award, founded upon an indictment at the Assizes, for not repairing a road, though the question in dispute be of a civil nature.

*G. Marriott* now moved for a rule to shew cause why the award should not be set aside, for certain objections appearing on the face of it; and contended, that though this was in form a criminal proceeding against the defendants, still it was in substance a civil suit, intended only to establish a civil right. The object of the motion was not to affect the form of the indictment, but merely to bring under the consideration of the Court the award of the arbitrators; but

*The Court* said, they had no authority over the order of a Court of oyer and terminer and general gaol delivery. This was a proceeding in form criminal, and the case had been dealt with at the Assizes in a manner which seemed best adapted to meet the justice of the case, and this Court had no power to interfere with the order of the Judge at the Assizes. If the defendants were aggrieved by any thing done by the arbitrators, their application for redress must be made in the Court below. Supposing this to be a matter of civil right, still it must come before the Court in a shape in which they had authority to interfere. Unless the case was within 9 & 10 *W. 3. c. 15*, the Court had no jurisdiction over the award.

Rule refused.

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Monday,  
Jan. 27.

The KING v. The JUSTICES of WARWICKSHIRE and  
The GUARDIANS of the POOR of BIRMINGHAM.

By statute 23 Geo. 3. regulating the affairs of the poor of Birmingham, the guardians and overseers thereby appointed are directed to adjust their accounts at quarterly meetings of their own body; and an appeal is given to the Sessions in respect of all matters done by virtue thereof; but the statute is silent as to any submission of the overseers and guardians accounts to Magistrates, as required by 50 Geo. 3. c. 49. Held, however, that mandamus would lie from this Court to the guardians and overseers, to pass their accounts in the manner required by that statute.

IN *Trinity* Term a rule nisi was granted, calling upon the Justices of *Warwickshire*, to shew cause why a writ of certiorari should not issue, to remove into this Court a certain order made at the last *Easter* Sessions, dismissing the appeal of *William Phipson*, against the payment of the sum of 396*l.* 13*s.* 4*d.* by the guardians and overseers of *Birmingham*, to the constables of the said parish, for the purpose of quashing the same; and also calling upon the said guardians and overseers to shew cause, why a writ of mandamus should not issue, commanding them to pass their accounts for the years 1821 and 1822, pursuant to the statute 50 *Geo.* 3. c. 49. On shewing cause against this rule, the case was this:—By the act of 23 *Geo.* 3. c. 44. for regulating the affairs of the poor in *Birmingham*, the guardians and overseers thereby appointed are directed to adjust their accounts at quarterly meetings of their own body. The statute gives an appeal to the Sessions in respect of all matters done by virtue of that act, but is silent as to any submission of the overseers and guardians accounts to Magistrates. At a meeting of the rated inhabitants, for the purpose of passing the accounts of the constables for the years 1821 and 1822, the accounts were disallowed, on the ground that amongst them was included a sum of 296*l.* 13*s.* 4*d.* being the amount of a bill of costs and charges, for prosecuting a person named *George Edmonds*, for publishing a libel of and concerning the conduct of two county Justices, in committing to prison a person named *William Plastans*, on the ground that he was a pauper, who had

been passed to his parish, and had returned without a certificate; but at a subsequent meeting, the same bill was again presented, together with one for additional costs respecting the same prosecution, amounting to 100*l.* both of which were allowed by a small majority of the persons present, upon which allowance the total amount was paid by the guardians and overseers, and formed part of their accounts. Thereupon *William Phipson*, one of the rated inhabitants, appealed at the last *Easter Sessions* against the allowance, and the appeal, after being heard, was dismissed. The appellant then applied for a case for the opinion of this Court, which was refused, except on the terms of paying the costs to which the respondents had been put by the appeal. It was now objected to the two-fold application for a certiorari and a mandamus, first, that the local act 23 *Geo. 3. c. 44.* relating to the poor of the parish of *Birmingham*, had in express terms taken away the writ of certiorari; and second, that as the guardians and overseers had already passed their accounts before two Justices (of which fact the appellant was ignorant until after the appeal had been tried), the mandamus would not lie, and that under such circumstances the Court had no authority to issue that writ.

*The Court*, after hearing *Scarlett, Adams, and Hill*, for the Crown, and *Reader and Holbeck* for the defendants, declined for the present giving any opinion as to the question whether the certiorari was or was not taken away, but as to that part of the rule which prayed for a mandamus to the guardians and overseers to pass their accounts,

ABBOTT, C. J. said—The question now is, whether the Court has authority to grant a mandamus to the guardians and overseers to pass their accounts. It is said

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that they have already passed their accounts, and that it is therefore unnecessary for this Court to interpose. If the fact be so, then they may return that fact to the writ of mandamus. The granting the writ therefore, will only put the question into a more solemn course of inquiry. I am quite satisfied that the local statute does not take away the jurisdiction of this Court in granting a mandamus. The local statute certainly gives the right of appeal to the Sessions, and whatever may be the construction to be put upon that statute as to the writ of certiorari, it clearly does not take away from us the power of ordering the guardians and overseers to do what is fit and proper to be done, prior to the exercise of the right of appeal. The question upon the present view of the case is, whether the accounts have been passed; I mean passed, so as to direct the attention of those who are to pass them, to this particular item, which is the subject of objection. I do not say, that in the investigation of voluminous accounts, such as these, the attention of the Justices is to be directed to the expenditure of every shilling which may happen to have been paid by the guardians in the ordinary discharge of the duties of their office, such as trifling sums paid to paupers, or minute expenses of that description. The strong fact here alleged is, that a very large sum of money had been paid for a particular purpose, the legality of which payment might be doubted. It is now supposed to have been paid under the sanction of the authority of the Magistrates, before whom it was the duty of the guardians and overseers to pass their accounts, but against the opinion of many persons who thought that such a disbursement ought not to have been made. It is alleged that the overseers and guardians were apprized of such objections before they proceeded to pass their accounts. Under such circumstances, it was their duty, in seeking to have the allowance of such an item, to have

directed the attention of the Magistrates to that item, so that the Magistrates might exercise their judgment upon the subject, and allow, or disallow it, according as they were satisfied or dissatisfied with it. What is the allegation in this case? The party who makes the affidavit states, that he was present when the accounts were submitted to the Justices, but that the attention of the Justices was not called to, nor did they proceed to examine the whole of the items, but merely looked at the summary, in which was a lumping sum of 2000/. paid to the constables for their expenses. There is no affidavit on the other hand to shew that the Justices ever inquired into or had their attention directed to the component parts of that sum. I am therefore clearly of opinion, that we ought to make absolute that part of the rule which prays for a mandamus to the overseers and guardians to pass their accounts, and it will be competent for them to make a return thereto. As to the remainder of the rule, that may be discharged or enlarged, at the discretion of the counsel for the Crown, until we see what becomes of the mandamus.

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BAYLEY, HOLROYD, and BEST, J.'s, concurred.

Rule absolute for a mandamus, and the
remainder of the rule enlarged.

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The KING v. JOHN WEBB HALL.

Wednesday,
Jan. 29.

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AN information in the nature of *quo warranto* having been filed against the defendant, calling upon him to shew by what authority he exercised the office of Registrar and authority he holds the office of Registrar and Clerk, of the Court of Requests, of the city of *Bristol*, is not entitled to costs under the statute 9 Anne, c. 20. s. 5.

The defendant
in a *quo war-
ranto* informa-
tion against
him, to shew
by what an-

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Clerk, to the Court of Requests, of the city of *Bristol*, and a special case having been made, and judgment given thereon for the defendant (a),

Adam now moved for a rule to shew cause why it should not be referred to the Master of the Crown Office, to tax the defendant his costs of the prosecution. He contended that this was a case within the statute 9 *Ann.* c. 20. s. 5. That section provided, that "in case any person against whom any information or informations in the nature of a *quo warranto* had been filed, should be found guilty of an usurpation of the said offices or franchises, it should be lawful for the Court, as well to give judgment of ouster against such person or persons, of and from any of the said offices or franchises, as to fine such person or persons respectively, for the usurpation of any of the said offices or franchises; and also it should be lawful for the Court to give judgment, that the relator or relators in such information named, should recover his or their costs of such prosecution, and if judgment should be given for the defendant or defendants in such information, he or they for whom such judgment should be given, should recover his or their costs therein expended against such relator or relators." Now, this case came at least within the words of the statute, inasmuch as the defendant held an "office," which was one of the terms used in the 5th section. The information has been filed against the defendant under colour of this statute, and it is at least reasonable that the relator should be subjected to the costs of the proceeding. Supposing the case not to be within the statute, still, if the relator availed himself of a *quo warranto* information, instead of proceeding by action, he ought to be in no better situation than he

(a) Vide 2 Dowling & Ryland's T. R. 248.

would have been, had he resorted to the latter mode of proceeding, by which the successful party would have been entitled to his costs. Here the relator proceeded under colour of the statute, and as a consequence, he subjected himself to the liabilities which the statute imposed. There was no case in the books, in which costs had been refused to a defendant in a *quo warranto* information. This question, however, has been discussed with reference to a claim of costs in the case of a successful relator, in *Rex v. Williams (a)*, and *Rex v. Wallis (b)*, where the Court considered the effect and meaning of the word "offices" or "franchises." It was for the Court, in this case, to determine whether the office of Registrar, and Clerk of the Court of Requests was an office within the meaning of the statute.

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ABBOTT, C. J.—I am of opinion that this is not a case within the statute, as is obvious when we look to the preamble, in connection with the clause which gives costs. The preamble recites, "that divers persons had illegally intruded themselves into, and had taken upon themselves to execute the *offices* of mayors, bailiffs, port-reeves, and *other offices*, and whereas divers persons who had a right to such offices, or to be burgesses or freemen of such cities, towns corporate, boroughs, or places, had either been illegally turned out of the same, or had been refused to be admitted thereto, having, in many of the said cases, no other remedy to procure themselves to be respectively admitted or restored to their said offices or franchises, of being burgesses or freemen, than by writs of mandamus, the proceedings on which are very dilatory and expensive;" and then proceeds to enact a remedy. The preamble speaks of mayors, bailiffs, port-reeves, and *other*

(a) 1 Burr. 402.

(b) 5 T. R. 375.

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*offices*, and of cities, towns, &c. or other *places*. It has been held, that the word "*places*," is *ejusdem generis*, with cities, towns corporate, and boroughs, and by the same rule, I think "*other offices*," mean other offices of the same kind, with mayors, bailiffs, and port-reeves, that is to say "*other corporate offices*." The party must be a borough officer, which this defendant clearly is not. As the defendant does not bring himself within the words of this Act of Parliament, he is not entitled to his costs.

BAYLEY, HOLROYD, and BEST, J.'s, concurred.

Rule refused (a).

(a) Vide *Rex v. Thatcher*, 1 Dowling & Ryland's T. R. p. 426; and *Rex v. Highmore*, id. 438.

Friday,  
 Feb. 7.

RICKARDS v. BENNETT and Another.

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 To support a claim of toll traverse, a special consideration need not be shewn. Where to trespass for distraining goods brought to the market of F. for tolls due in respect thereof, the defendant justified the distress by shewing a prescriptive right as lord of the manor of F. of which the town of F. formed a part, to take a certain reasonable toll for goods brought within the town for the purpose of being there delivered, and in fact delivered, and averred certain special considerations for taking the toll, to which the plaintiff was no party:—Held, after verdict, that the prescriptive right of soil in the manor, (the toll being coeval therewith) was a sufficient general consideration for the toll, as a toll traverse, the plaintiff having brought and delivered goods within the manor.

TRESPASS for taking certain cheese and corn of the plaintiff. The defendant pleaded, first, the general issue, Not guilty, and then several special pleas, justifying the alleged trespass, in respect of the defendant *Bennett's* right of toll for certain goods brought to *Farringdon* market for sale. These pleas stated in substance, that this defendant, at the time of the alleged trespass, was seised in fee of the manor of *Great Farringdon*, in the county of *Berks*, whereof the town of *Farringdon* from time

shewing a prescriptive right as lord of the manor of F. of which the town of F. formed a part, to take a certain reasonable toll for goods brought within the town for the purpose of being there delivered, and in fact delivered, and averred certain special considerations for taking the toll, to which the plaintiff was no party:—Held, after verdict, that the prescriptive right of soil in the manor, (the toll being coeval therewith) was a sufficient general consideration for the toll, as a toll traverse, the plaintiff having brought and delivered goods within the manor.

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immemorial was a part, and which town was, from time immemorial, divided into two townships; that he had immemorially repaired and maintained, and still ought of right to repair and maintain, at his own proper costs and charges, a certain market-house, a certain lock-up-house, a certain pound, two pair of stocks, one half of a bridge over the River *Thames*, and the stalls and stallage of the market-place of *Farringdon*, and also to provide a certain brass bushel measure, for the use and benefit of all persons resorting to the said town of *Farringdon*, and that from time immemorial he was entitled to receive for every ton of hard cheese, and for every quarter of corn brought into the said town for sale, and there sold and delivered within the town, or brought for the purpose of being delivered, and delivered within the town, a certain reasonable toll or duty of sixpence for each and every ton of such cheese, and one penny for each and every quarter of such corn, and so in proportion for smaller quantities, the same being payable and to be paid by the seller of such cheese and corn, after the arrival thereof within the said town of *Farringdon*, and when the same is ready to be delivered, but before the actual delivery thereof to the purchaser. The defendant then claimed a right to distrain upon the goods so brought to market for the tolls payable in respect thereof, after demand and refusal, and then averred that the plaintiff had brought within the town of *Farringdon* certain quantities of cheese and corn, in respect of which certain tolls or duties, after the rate set out, became and were payable, and so justified the alleged trespass as a distress for the said toll, after demand of and refusal to pay the same. Issue upon the pleas. At the trial before *Garrow*, B., at the *Berks* Lent Assizes 1822, the case was left to the jury upon the merits, and the defendants had a verdict.

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Jervis, in *Easter Term* last, obtained a rule nisi to arrest the judgment, upon the ground that the pleas set forth no consideration for the toll, sufficient in itself, or extending to the plaintiff, and founded his motion upon the authority of the case of *Trueman v. Walgham* (a).

W. E. Taunton, Shepherd, and *R. B. Comyn*, now shewed cause. The objection raised is to the form of the pleas, which it is said are insufficient to support the justification, because the consideration for the toll there set out does not extend to the plaintiff. This rule was granted upon the authority of *Trueman v. Walgham*; but that case is very distinguishable from the present. That was a prescription for a toll through a highway; the defendant pleaded that he was seised of the town, and that he was liable to repair the streets; but as it did not appear that he was liable to repair the particular street along which the plaintiff was passing when the seizure was made, the consideration was held insufficient. But here the prescription is for a toll on goods brought within the manor, and there are many cases precisely similar to the present, which shew, that for such a prescription the general consideration here set out is quite sufficient. *Dyer*, 352. *Warrington v. Mosely* (b), *Ward v. Knight* (c), *Crisp v. Bellwood* (d), *James v. Johnson* (e), *Smith v. Shephard* (f), and *Colton v. Smith* (g). From these authorities it may be collected, that to sustain a toll traverse the mere entry of the goods into the manor, no matter by what means, or on what part of it, is sufficient, and that any easement afforded to the public by the person seised of the manor is a good consideration. In such a case it is not requisite to shew that the plaintiff had actually taken the benefit

(a) 2 Wils. 296.

(b) 4 Mod. 319.

(c) Cro. Eliz. 227.

(d) 3 Lev. 424.

(e) 1 Mod. 231.

(f) Cro. Eliz. 710.

(g) Cowp. 47.

of the consideration, it is enough that he might have done so if he chose. Upon the facts stated in these pleas, the Court will presume that the grant of the toll was from time immemorial. If the consideration be in fact insufficient, it was the duty of the plaintiff to have replied to the pleas, but having joined issue upon them, and that issue being found against him, he is not entitled to make such an objection as this. As a toll traverse the consideration stated here, is clearly sufficient, but the argument may be carried yet further; for, under the circumstances of this case, it was not necessary to state any consideration at all. Possession of the manor from time immemorial, and the mere act of landing the goods within it, are of themselves a complete answer to this action, because, where there is ground for supposing that a prescription might have a lawful beginning, it is well enough without shewing it. *Smith v. Shephard* (a). Upon these grounds it is clear that the present rule must be discharged.

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Jervis and *G. Cross*, in support of the rule. In order to justify a trespass in claiming toll, it must appear what the toll is, and there is no evidence to that effect in the present case. The case of *Trueman v. Walgham* is precisely in point with the present, and the observations made upon the plea there will apply strictly to the present defendants' pleas, namely, that the two species of toll are artfully confounded together. Not one of all the considerations stated in these various pleas is applicable to the plaintiff, nor is any one of them co-extensive with the claim set up. It is clear upon the evidence that the goods were seized upon the highway, but there is no proof that the highway was part of the manor, so that toll is claimed by the defendant in right of his manor, without

(a) Cro. Eliz. 710.

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proving that the goods ever were in fact upon the manor. Now that ought to have been distinctly shewn by the defendant; and the Court cannot presume it. If the toll is claimed in respect of the ownership of the soil, it must be shewn to have been coeval with the right of soil, and that very principle is recognized in *Lord Pelham v. Pickersgill* (a), and in the case of *Lord Pelham v. Haine*, there cited. But the short and conclusive argument here is this; there are only two species of toll known to the law, namely, toll thorough, and toll traverse; the toll claimed by the defendant must be of one or the other of these species; if this be a toll thorough, it is clear from all the authorities, that a full consideration extending to the plaintiff must appear; if it be a toll traverse it is equally clear that some consideration at least must exist. But upon the face of these pleadings the defendant is not brought within either of these rules; for what consideration is there to be found here either extending specially to the plaintiff, or applying generally to all mankind? It is stated indeed that defendant is lord of the manor, but *non sequitur* that he is also owner of the soil; and he must be both, in order to sustain this claim. This distinction is laid down in *Lord Pelham v. Haine*. The only strong authority cited on the other side is the case of *Crisp v. Bellwood*, and that seems to have been somewhat invalidated by the more recent case of *Colton v. Smith*. Upon the whole view of the case, this toll, if it be a toll at all, must be claimed as a toll traverse; and in order to support that claim there must be a dedication of the soil and freehold to the public, which has not been shewn here, nor indeed could be, because there is no averment that the defendant ever was owner of the soil. His mere right as lord of the manor is not ground

(a) 1 T. R. 660.

enough to presume his ownership of the soil (a); and therefore the pleas in this case are insufficient, and the plaintiff is entitled to have the judgment arrested.

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ABBOTT, C. J.—The point last suggested in argument does not arise in the present case. The plea alleges not only that the manor has existed time immemorial, but that from time immemorial the town has been parcel of the manor, and it seems to me we must intend, that, from time immemorial, the person who was seised of the manor was seised of the town also. Then, if the payment is alleged to have been made time immemorial, are we not thence to infer that the owner of the manor, who has erected the market-house, and taken upon himself the burthen of maintaining the buildings and other conveniences mentioned in the plea, has set out sufficient consideration for the toll received from all persons bringing their commodities into the town, and delivering them upon that which is his soil, and of which he has the inheritance? It seems to me that we must so understand it, and that in so doing we are warranted by the authority of *Colton v. Smith*, and *Crisp v. Bellwood*, which I think shew that this is a sufficient consideration for the toll. The present case in point of form is free from the objection which prevailed in *Trueman v. Walgham*, because here, although the plea alleges divers special matters, it has not, in point of form, tied down the consideration to those matters, to which it is said the plaintiff is an entire stranger. But he is not an entire stranger to the consideration stated here, because he has the benefit of the erections which are mentioned in the pleas, and of placing his commodities in the town. It seems to me, therefore, that putting the case upon that ground, there is a sufficient consideration stated to render the plaintiff liable to the toll.

(a) Com. Dig. tit. Toll. Roll. Abr. Id.

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BAYLEY, J.—I think this is good as a toll traverse. The pleas allege certain special considerations, to which undoubtedly the plaintiff is a stranger, and unless they can be supported by something independent of those considerations, they present no answer to the action. But I think there is sufficient consideration stated in these pleas independently of the special matters. It is stated that the defendant is lord of the manor, which must of course have existed before time of legal memory; that the town from time immemorial has been and still is part and parcel of the manor; that the lord of the manor from time whereof the memory of man is not to the contrary, has been entitled (not by reason of the special grounds stated in the previous part of the pleas, but generally) to receive the toll in question for certain goods brought into the said town for sale; and a general obligation is averred, imposing upon the plaintiff the liability to pay that toll. Then it is in respect of certain goods brought into the manor by the plaintiff, that he is made chargeable to the toll, and I think that as originally and before the time of legal memory the soil of the whole of the manor was in the lord, we are at liberty to infer that this toll was created by the lord at the period when the soil both of the town and of the manor was vested in him. We cannot arrest the judgment in this case upon a speculation that it is possible this might not under some circumstances have been a good prescription. The plaintiff is to shew that it must have been by law a bad prescription in its origin; and if it be possible that it might have had a good legal origin, so as to have existed immemorially, we are bound to conclude that it in fact had such origin. This might have had a legal origin; for at the time when the toll was created the soil and freehold of the whole manor, and of the whole town, were in the lord. On these grounds it appears to me, that this case

ranges exactly within the cases mentioned by my Lord Chief Justice. In *Lord Pelham v. Pickersgill*, the tolls could not be supported, and never could have been legally demanded, unless the highway had been shewn to be an immemorial highway, and unless the receipt of the toll had been established at the period when the highway was dedicated to the public. It seems to me, that we should not be warranted in arresting the judgment on these pleas; for as the jury have found that the prescription had existed in point of fact, we are not at liberty to say that it is not good in point of law.

HOLROYD, J.—I am of opinion that the prescription as pleaded is good in point of law. This is an objection on the record; the Jury have found the prescription existing in fact; and if the consideration, or that which the law requires to be stated in the plea, was not stated sufficiently, certainly the plaintiff would be entitled to judgment *non obstante veredicto*. If the claim was in respect of goods brought through the manor as a highway, this case would range itself within the principle applicable to cases of toll thorough. This, however, is not a claim for passing through the manor; but a claim for toll by prescription, for bringing goods into the manor, delivering them there, or depositing them for that purpose, or for sale. The prescription pleaded in this case appears to me to be established not only by those cases already mentioned by the Court, but also by that of *James v. Johnson*, in all of which the toll was claimed, not for passing the highway, but for coming into the manor, and where the consideration was not co-extensive with the claim. In one of those cases the claim was in respect of repairing a wharf, and it was held, that the bringing the goods within the manor, although the wharf was not used, was sufficient to support the claim. This case is mainly

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distinguishable from those where toll has been claimed by prescription for passing along the highway, and where it has been held that a special consideration must be stated. The King's subjects have a common law right to pass along every highway, which is in itself a right existing previous to all prescriptions, and therefore, in order to establish a toll in such cases, the consideration must be shewn to be co-extensive with the claim. There is a case of *The Mayor of Nottingham v. Lambert (a)*, which has not been adverted to. In that case there was a claim by the corporation of *Nottingham* to take toll for passing the ancient navigable River *Trent*, and it was held that the prescription for the toll could not be supported in law, because no consideration for it was shewn. That decision was founded upon the very principle to which I have just alluded in the case of a highway, namely, that the River *Trent* having been immemorially a navigable river, every subject had a common law right to navigate it at his pleasure, unless some consideration was shewn for the toll. But in that very case *Willes*, C.J. in delivering a very elaborate judgment, admits the propriety of those decisions which have been referred to by my learned Brothers, and expressly declares, that in a toll traverse the consideration may be implied. Upon this principle I am of opinion that the prescription here pleaded is sufficient, without shewing any more special consideration. It does not appear whether this was part of the highway, or not; but whether the consideration should have been stated as for a toll thorough, or not, it seems to me that the liberty of landing goods within the manor is a sufficient consideration for the toll, although the particular place where they were landed, may have been a highway. On these grounds I think this rule must be discharged.

(a) *Willes*, 111.

BEST, J.—I am of opinion that these pleas are good after verdict. I agree that the prescription must have a good beginning to support it in point of law, and it appears to me that this prescription must be held to have had a good beginning, not as for a toll thorough, but as for a toll traverse. The distinction between the two is, that in the former there must be a special consideration shewn to impose the obligation of paying the toll, but in the latter, the consideration may be presumed. The special matter set out in these pleas does not in my opinion shew a sufficient consideration for a toll thorough, because there is no averment that the plaintiff received any benefit from it; but what is said in the cases of *Colton v. Smith*, and *Crisp v. Bellwood*, authorizes us in holding, that although the matters specially stated would not be sufficient to support the pleas as for a toll thorough, yet that they are enough to support them for a toll traverse. The party claiming the toll here, is not merely the lord of the manor, but may, in my opinion, fairly be presumed to be also owner of the soil, and the ownership of the soil is sufficient consideration for the toll traverse. Indeed, correctly speaking, it is not necessary to set out any consideration, because the consideration is implied from the use of the soil. In the case of *Lord Pelham v. Pickersgill*, it was only stated, that the person who claimed the toll had the manor, but it did not appear, nor could it be presumed, that he was owner of the soil; and in the case of *The Mayor of Nottingham v. Lambert, Willes, C. J.*, in giving judgment, decides that case upon that very distinction; because he says, it does not appear that the plaintiffs are owners of the soil, and therefore the case is very different from that where the party claiming the toll has the right to the manor and to the soil. He considers the right to the manor not to be sufficient as a consideration for toll traverse, unless there is also the

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right to the soil, where the claim is made. In this case, if it is shewn that the defendant is owner of the manor, a foundation is laid for presuming that he also owns the soil, and I think there is sufficient to raise that presumption; and if so, the use of the soil by the plaintiff would be a good consideration, upon the principle I have stated, to support the defendant's claim. I am of opinion that we may reject from the pleas all that is necessary to shew that this was a toll thorough, if there remains enough to shew that it is good as a toll traverse. The consideration here is the use of the soil, which may fairly be presumed to belong to the lord of the manor, and I think that is sufficient to support the prescription as stated on these pleadings.

Rule discharged.



Saturday,
 Feb. 8.

Ex parte MARINEL KRANS and Others.

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 Where prisoners taken into custody after an engagement at sea between a revenue cutter and a vessel suspected to be a smuggler, of which the prisoners were the crew, were delivered on board a king's ship, and detained for fourteen days without any warrant, and were afterwards brought up by habeas corpus to be discharged, and it appearing from the return that there was cause to suspect them of a felony, the Court refused a discharge, and directed them to be committed to the custody of the Marshal of the Marshalsea, in order that they might be taken before a competent tribunal, to be dealt with according to law.

ON a former day in this Term, *Platt* obtained writs of habeas corpus, directed to the Commander of his Majesty's ship *Severn*, stationed in the *Downs*, to bring up the bodies of twenty-two persons, who had been confined, as was alleged, on board that vessel, from the 13th until the 27th *January*, (the day on which the writs issued) without any warrant for that purpose, in order that they might be discharged. At the same time a writ of certiorari issued, on the motion of the *Solicitor-General*, to the Coroner of the town and port of *Dover*, to return into this Court two inquisitions taken before

him, one touching the death of *William Cullum*, a deputed mariner of his Majesty's revenue cutter the *Badger*, and the other, touching the death of three persons, unknown, together with the depositions taken under such inquisitions respectively. The bodies of the twenty-two persons above mentioned, were now brought into Court, and the returns to the writs of habeas corpus, and certiorari read. It appeared from the return to the writs of habeas corpus, that on the 13th of *January* the persons above-mentioned were delivered on board the *Severn* in custody, charged with being concerned in an engagement at sea, on the same day, between his Majesty's revenue cutter *Badger*, and a certain smuggling vessel, which had been captured, and of which the prisoners were part of the crew, in which engagement *William Cullum*, a deputed mariner of the *Badger*, was killed, and that the prisoners had been detained until they could be conveniently brought to *London* to be dealt with according to law. From the return to the writ of certiorari it appeared that an inquisition was taken before the Coroner for the town and port of *Dover* on the 16th of *January*, on the body of the said *William Cullum*, who had been killed by a gun-shot wound, in an engagement between the *Badger* and a smuggling cutter, after the crew of the cutter had cried "quarter," and that the inquest had returned a verdict of "wilful murder" against some person or persons to the jurors unknown; that on the same 16th of *January*, another inquest was held on the bodies of three men then lying dead in the town and port of *Dover*, and that the jury had returned thereon a verdict of—Justifiable Homicide. The depositions taken under this latter inquisition entered into a more detailed account of the affair between the *Badger* and the smuggling cutter above mentioned. In substance they stated, that early in the morning of the 13th of *January*, the *Badger* was cruising in the *British*

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Channel, about three leagues from the *French* coast, when a strange vessel came in sight; that a signal was given to the latter to lay to, of which no notice was taken; whereupon the *Badger* discharged an unshotted gun with as little effect; that chase was then given for some time, when the *Badger* discharged a loaded gun; that then a general engagement ensued, with small arms and great guns on both sides, which, having continued a considerable time, the crew of the strange vessel cried for "quarter," and made signals to surrender. After the cry of "quarter," and whilst the *Badger* was grappling to take possession of the strange vessel, a fresh firing commenced on the part of the crew of the latter, by which *William Cullum*, one of the crew of the *Badger*, was killed. The strange vessel was then boarded, and it was found that two of her crew, consisting of twenty-five men, were lying dead on the deck, and a third, who afterwards died, severely wounded; whereupon the vessel was captured, and the surviving crew, consisting of twenty-two persons, taken into custody, and afterwards delivered on board the *Serern* on a charge of wilful murder. Upon searching the strange vessel she was found to be laden with half ankers of foreign spirits, tea, tobacco, and other contraband goods, and had on board a large supply of warlike weapons and ammunition. No colours had been hoisted by the alleged smuggler, but on board were found two *Dutch* flags. The language spoken by the crew was entirely *English*, and at the time the vessel was first seen, she was sailing in a direction towards the coast of *Ireland*. Under these circumstances,

*Brougham* and *Platt* submitted that the prisoners must be discharged, and made three points; first, that the original detention was illegal, and not warranted by the circumstances disclosed on the returns to the writs; se-

cond, supposing the original detention not to be illegal, it had become so by the unreasonable confinement from the 13th to the 27th *January*, without any warrant or other legal process; and, third, that in the absence of any specific charge, the Court had no authority to deal farther with the prisoners, by changing their custody, and they must therefore be liberated. First, as to the return to the habeas corpus, it is obviously defective, and discloses nothing which can at all warrant the detention of the prisoners. It is true the return states the fact, that these men were delivered into the custody of the captain of the *Severn*, by the commander of the *Budger*, as persons who had been on board a vessel, captured by the *Badger*, but nothing is shewn to connect these men with the engagement stated to have taken place, and all that appears against them is the statement of information received from other persons. It is clear, therefore, that the return to the habeas corpus, contains nothing to justify the farther detention of the prisoners. Then is there any thing upon the depositions which at all affects the prisoners, supposing them to have been engaged in the transaction in question? Certainly not. From the depositions returned, it appears that the King's vessel was the first aggressor, and the fatal consequences which ensued appear to have been justifiable upon the ground of self defence. Supposing this not to be so, still there is nothing to point out any of the individuals before the Court as participants in the affray. None of them are identified; and therefore from the very beginning their detention was illegal. But, second, supposing there might have been some colour for the detention originally, the confinement from the 13th to the 27th *January*, without any warrant or any steps taken to put their imputed conduct into a course of legal investigation, was illegal, and the Court is now bound to discharge them. Nothing disclosed

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on the return appears to justify this delay, before any legal and proper steps were taken. It is clear that the Coroner might have issued his warrant for the detention of the prisoners, as soon as the inquest had returned the verdict on the body of *William Cullum*, if there had been any ground for imputing criminality to the prisoners. No such step having been taken, their detention for so long a period is clearly unlawful, and the Court has no alternative but to order their liberation. If the delay of a fortnight before any steps are taken to institute a legal investigation into the conduct of the prisoners could be justified, their detention for two or three years, or any length of time, might equally be justified upon the same principle. Supposing then their detention in the first instance was excusable, the unreasonable length of time which afterwards elapsed before any proceedings were taken, renders their confinement altogether illegal, and they are entitled to be discharged from custody. Then, thirdly, admitting these objections to the original and continuing confinement to be not tenable, still, as there is here no specific charge on oath against the prisoners (whatever suspicions may be entertained of their conduct), the Court has no authority to remand them either to the same or to a new custody. If in this case there had been a commitment on a specific charge of felony, though the commitment was informal and irregular, still the Court, in the exercise of its discretion, would re-commit the party, if upon the return there appeared to be a substantive charge to warrant their farther detention; but here no such facts are disclosed as will reasonably lead the Court to conclude that the prisoners are implicated in the transaction in question. This is not like the case of *Rex v. Marks (a)*, which was a commitment under the Unlawful Oaths Act, 37 Geo. 3.

(a) 3 East, 157.

c. 123, where the Court, finding a specific charge against the prisoners contained in the depositions, remanded them, though the warrant of commitment was clearly defective. Here there is no commitment—no specific charge—no depositions pointing out the prisoners as implicated in any offence—and nothing whereon to found any farther proceedings against them in this Court, and therefore they are entitled to be discharged. The case of *The King v. Doctor Shebbeare* (a), is an authority to shew that a person brought up in custody, under a habeas corpus, shall not be re-committed to the same custody; but that case is distinguishable from this; for here there is no ground for committing these prisoners to a new custody, and there is no instance to be found in which this Court has ever acted as Justices of the Peace, by committing a person to a new custody, who has been brought up from an intermediate custody prior to any specific charge before a Magistrate upon oath. On these grounds the prisoners are entitled to be discharged.

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*Copley*, S. G., contra, was stopped by the Court.

ABBOTT, C. J.—I am of opinion that we ought not to discharge these persons on any of the grounds which have been suggested in argument. The only difficulty which the Court feels, is, as to the custody in which the prisoners shall now be placed. My opinion upon the case is founded entirely upon the matters stated upon the returns to the habeas corpus and the certiorari. Indeed, my opinion would be the same if founded upon the return to the habeas corpus only, because that document states the fact that these men were placed in the custody of the commander of the *Severn* upon a specific charge, namely, that of being concerned in an engagement between the

(a) 1 Burr. 460.

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Badger and a smuggling vessel, of which these persons were part of the crew, in which a person named *William Cullum*, a deputed mariner of the *Badger*, was killed, and that they were detained until they could be conveniently brought to *London*, to be dealt with according to law. I will only advert to the proceedings before the Coroner, for the purpose of saying, that they afford strong confirmation of the fact stated in the return to the habeas corpus, namely, that the inquest have found that the person named *William Cullum*, in the return, had been murdered by some person or persons unknown. In justice to the prisoners, I forbear saying any thing more respecting these depositions, lest they should be in any degree prejudiced in any proceedings which may hereafter be instituted. We have the fact stated in the return, that these men were delivered on board the *Serern* on a specific charge, and were merely detained until a fit opportunity could be found for safely conveying them to *London*, to be dealt with according to law. That is sufficient to justify us in ordering their further detention. It is said that this is a novel proceeding. I certainly do not recollect any instance like the present, where persons were brought up from an intermediate custody, with a view to another inquiry. If upon this return, connected with the other documents in the case, we saw plainly that these persons were unlawfully detained in custody, it would be our duty to discharge them: but if we do not see any illegality in their detention, it is equally our duty to put the matter into some course of legal inquiry. That it is lawful for any person, whether a public officer or not, to take into custody any person charged with the commission of an offence, and keep him until he can be taken before a proper tribunal, is a proposition not to be denied. Suppose, for instance, an application made at the sitting of the Court for a habeas corpus to

be directed to a person, not a public officer, to bring up the body of a man alleged to be detained in his custody, without any lawful cause, and the writ being served immediately, the party, before the rising of the Court, brought up his prisoner, and made a return to the writ, stating that the person whose body he brought into Court was delivered into his custody upon a charge of a capital felony, in order that he might be taken before a Magistrate, to be dealt with according to law, should we order the prisoner to be liberated upon such a return? Clearly not. But it is alleged here, that these persons have been detained an unreasonable length of time, so long indeed as to make the detention altogether illegal, and an extreme case is put of a detention for two or three years, which, it is said, might be justified upon the same principle. I do not mean to say that the detention may not be so long as to shew that the ground of detention is not a just ground, and is altogether unfounded; and in such a case the Court would deal with it as justice required. But can we say that a detention of thirteen or fourteen days is, under the circumstances of this case, an unreasonable detention? My opinion, however, does not turn upon the length of the detention. Here are persons taken into custody under circumstances which justify a suspicion that they are guilty of a capital offence; they are placed for security on board one of his Majesty's ships, stationed not far from the shore; they are numerous; they are taken as smugglers; and it is not every moment of the day that it would be safe to land so large a body of men, and take them before a Magistrate. Assuming that the Magistrates in the local jurisdiction had authority to investigate the case, still it might be thought prudent that the prisoners should be taken to *London*, for the purpose of conveying them before some competent tribunal, where their conduct might be inves-

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tigated, and the fact ascertained, whether there was any reasonable ground for the further detention of all or any of them. Under such circumstances I cannot say that the length of time during which they have been detained is unreasonable, the cause of their original detention being a lawful cause. Not being, under the circumstances, an unreasonable length of time, I think we ought not to discharge these persons. We are of opinion that the proper course for the Court to take (whatever may be its power of interfering in the first instance, in the way in which Magistrates and Justices of the Peace generally act), is to direct that the prisoners shall be taken before some competent tribunal, in order that the matter may be further investigated, and the fact ascertained upon the merits of the case, whether there is any ground for their further detention. If, after this, any unreasonable delay shall take place, it may be competent to the parties to make a further application, and then the Court will adopt such steps as may appear necessary for expediting the proceedings, so that no injustice shall be done. It seems to us that this is the fit and proper course for the Court to adopt towards the advancement of public justice. The rule therefore which the Court pronounces is, that the prisoners be committed to the custody of the Marshal of the Marshalsea, in order that they may be taken at the first convenient opportunity before some competent authority, to be examined touching the matters contained in the return to the habeas corpus, and dealt with according to law.

BAYLEY, HOLROYD, and BEST, J.'s, concurred.

The prisoners were then committed to the custody of the Marshal of the Marshalsea, in pursuance of the rule pronounced by the Court.

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The KING v. The JUSTICES of GLOUCESTERSHIRE.

Tuesday,  
Feb. 11.


**T**HIS was a motion for a mandamus to the Justices at Sessions to enter continuances, and hear an appeal in a matter of bastardy; and now, on shewing cause against the rule, the question was, whether the notice of appeal given by the appellant, was in conformity with the statute 49 Geo. 3. c. 68. s. 5, which requires that the party appealing shall give ten clear days notice of his, her, or their intention of bringing such appeal, *and of the cause and matter thereof*, &c. The notice given by the appellant in this case was of his intention "to prosecute an appeal against an order of filiation, whereby the appellant was adjudged to be the reputed father of a female bastard child, born of the body of *Elizabeth Hay*, which had become chargeable to the parish of *South Lea*, in the county of *Oxford*." The notice was a mere echo of the form of the order, without stating any specific grounds of appeal. The Sessions considered this notice insufficient, and therefore dismissed the appeal.

*Bligh*, in shewing cause against the rule, contended, that the notice which had been given, was not in conformity with the requisites of the statute, which required two things, first, that the party appealing should give notice of his *intention* to appeal; and, second, that the notice should contain a statement of *the cause and matter thereof*, which meant the specific grounds of objection to the order of filiation. The notice in this case was no more than a notice of intention to appeal, and was totally silent as to the cause and matter thereof, and consequently

By statute 49 Geo. 3. c. 68. s. 5. the notice of appeal in a matter of bastardy must specify the cause and matter thereof. Where a notice given by the reputed father of a bastard child of his intention to appeal against an order of filiation, merely stated that he intended to prosecute an appeal against an order of filiation, whereby he was adjudged to be the father of a female bastard child, born of the body of *E. H.*, and chargeable to the parish of *S. L.* pursuing the words of the order without specifying the particular grounds of appeal:—Held, that the notice of appeal was insufficient.



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was insufficient. He cited *Rex v. The Justices of Salop* (a).

*G. Cross*, contra, insisted, that the notice which had been given, did, in substance, convey to the parties interested, the grounds of appeal. An order of filiation contained a variety of matters, against each of which the reputed father of a bastard had a right of appeal; namely, the sum awarded for apprehension, the expenses of the mother's lying in, the weekly maintenance of the child, and the adjudication of filiation. The notice in this instance contained a sufficient specification of the ground of appeal, inasmuch as it stated expressly that the party appealed against the adjudication that he was the father of the child. This must be understood to mean that he objected wholly to that part of the order which adjudged him to be the father. Under this notice the respondents must necessarily infer that the appellant only meant to dispute the fact of his being the father of the child named in the order, as being born of the body of *Elizabeth Hay*, without regard to any of the other matters contained in the order. There being several other grounds upon which he might have appealed, the necessary inference was, that he intended to confine his appeal to that which adjudged him to be the father of the child. It seemed, therefore, to be unnecessary that the notice should contain any further statement of the cause and matter of the appeal.

ABBOTT, C. J.—I am of opinion that this notice was insufficient. The Act of Parliament requires that the notice of intention to appeal, shall also contain a specific statement of the cause and matter thereof, and then pro-

(a) 4 Barn. & Ald. 626.

ceeds to require that the Justices at Sessions shall determine the cause and matter of such appeal. That clearly means the merits and not merely the form of the order. Here the notice simply contains a description of the order, whereby the appellant is adjudged to be the father of the child, without stating any ground of objection to such adjudication. It does not go on to allege any objection to the adjudication in point of form or substance, and there is therefore nothing specific so as to direct the attention of the respondents to the grounds of appeal. The respondents are left entirely to guess at the objections, and must go to the Sessions unprepared as to those points, which it may be necessary for them to prove in evidence. This notice is merely a description of the order, whereby the appellant is adjudged to be the father of the child, and does not contain any statement of the cause and matter of appeal, and consequently it is not in compliance with the statute.

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HOLROYD, J. (a).—The object of the statute is to require a statement in the notice of the particular grounds of objection to the order of filiation upon the merits. A notice as to the order itself is not sufficient, unless it also contains a statement of the grounds of appeal touching the matter thereof, in order that the respondents may come to the Sessions prepared to meet the cause and matter of the appeal, and not merely the form of the order.

BEST, J.—This notice does not specify the cause and matter of the appeal, but merely describes the order itself, which is clearly insufficient.

Rule discharged.

(a) Bayley, J. was absent.

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Tuesday,  
Feb. 11.

## The KING v. ROGIER and Another.

Keeping and maintaining a common gaming house, and for lucre and gain, causing and procuring idle and evil-disposed persons to come there to play together, at "Rouge et Noir," and permitting such persons to play at such game for large sums of money, is an offence indictable at common law.

**I**NDICTMENT against the defendants, for a nuisance, in keeping a common gaming house. The first count charged, that *Charles Edward Rogier* and *William Southwell Humphrey*, on, &c. unlawfully did keep and maintain a certain common gaming house, and in the said common gaming house, for lucre and gain, did cause and procure divers idle and evil-disposed persons to frequent and come to play together, at a certain unlawful game at cards, called "Rouge et Noir:" and in the said common gaming house, on, &c. unlawfully and wilfully did permit and suffer the said idle and evil-disposed persons to be and remain playing and gaming at the said unlawful game, called "Rouge et Noir," for divers large sums of money, to the great damage and common nuisance, &c. Second count was the same as the first, only charging the defendants with keeping and maintaining a certain common gaming room. Both counts charged the offence as an offence at common law, not against any statute. Plea, Not Guilty, and Issue thereon. At the trial before *Abbott*, C. J., at the *Middlesex* Sitzings after last Term, the defendants were found guilty.

*Curwood* and *Platt* now moved to arrest the judgment. This is an indictment at common law, and unless the offence with which it charges the defendants be a common law offence, the indictment cannot be supported. The indictment charges, first, the keeping and maintaining a common gaming house; and, second, the permitting a certain unlawful game, called "Rouge et Noir" to be played in the said house, neither of which acts is an

offence at common law. Mr. Serjeant *Hawkins* is the first writer who lays it down as a *dictum*, that the keeping a gaming house is a common law offence, or, in other words, a nuisance *per se*, which it must be, in order to come within the scope of this indictment, and his language is not very decisive on the subject, being only, "it hath been said that all common gaming houses are nuisances in the eye of the law." (a) A very modern author ventures indeed much further; for, in the last edition of *Burn's Justice*, it is said, "it is clearly agreed that all common gaming houses are nuisances in the eye of the law; (b) and he cites *Hawkins's Pleas of the Crown*, and *Russell, on Crimes* (c), as authorities in his favour. It has been already shewn that the former of these by no means warrants the assertion in *Burn*, nor does the latter, the language there being founded only on the same *dictum* in *Hawkins*. It cannot indeed be denied that a gaming house may, by improper management, become a nuisance; but it is not so *per se*, which this indictment charges it to be. Then with respect to the game of "Rouge et Noir," the indictment is evidently bad. No gaming of any description is an offence at common law, as is clearly proved by the various statutes which have been passed for the express purpose of making it an offence. But every one of those statutes sets out by name those games which are prohibited as unlawful, and in no one of them is the game of "Rouge et Noir" mentioned. The inference therefore becomes irresistible; first, that, independently of the statute law, *all* games are lawful; and, second, that this particular game not being prohibited, remains to this day lawful also. There are indeed two separate allegations in this indictment, first, that the playing was illegal, and, second,


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(a) 1 Hawk. P. C. c. 75. s. 6.

(c) Page 433.

(b) Chetwynd's ed. vol. ii. p. 582.

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that the game of "Rouge et Noir" was illegal; but the first is not stated in the indictment. Now it is illegal, and the second is not illegal; therefore, if either of the allegations is imperfect, the offence is insufficiently described, and the defendants are not called upon to answer it. Upon either of these grounds therefore, first, that the keeping a gaming house is not *per se* an offence as here laid; and, second, that the game of "Rouge et Noir" cannot be noticed now, for the first time, by the Court as illegal, when all games not prohibited by statute (which that is not) are lawful; this indictment is bad, and the defendants are entitled to have the judgment arrested (*a*).

ABBOTT, C. J.—I am of opinion that the evidence in this case was quite sufficient to support the indictment, and that consequently there is no ground for the present motion. It is not necessary, on the present occasion, to decide whether the keeping a common gaming house is *per se* a nuisance, or whether the game of "Rouge et Noir" is *per se* an illegal game, though the inclination of my mind is strongly in favour of the affirmative of both those questions. But allowing, for a moment, that both those questions may be answered in the negative, still there are allegations in this indictment which, if they are supported by the evidence, will clearly render both the acts charged offences at common law. If a common gaming house be so conducted that it becomes a receptacle for idle and disorderly persons, who are permitted to assemble there and enter into play for sums of an illegal amount, it becomes a public nuisance, and the maintaining it is an offence indictable at common law; and if the game of "Rouge et Noir," or any other game, however innocent in itself, is played at by such persons, and to

(*a*) Vide 33 Hen. 8. c. 9. ss. 11, 12, and 14. 25 Geo. 2. c. 36. s. 5. 58 Geo. 3. c. 70. 5 Bac. Abr. *Nuisances* (A); and 1 Hawk. P. C. c. 22. s. 94. et seq.

an excessive amount, it becomes an illegal game, and those who hold out to others the means of so playing at it are guilty of a common law offence. Now, to apply those positions to the present case:—The indictment charges, “that the defendants unlawfully did keep and maintain a certain common gaming-house, and in the said house, for lucre and gain, did cause and procure divers idle and evil-disposed persons to frequent and come to play together, at a certain unlawful game at cards, called ‘Rouge et Noir,’ and unlawfully and wilfully did permit and suffer the said persons to be and remain playing and gaming at the said unlawful game for divers large sums of money.” Then does the evidence support these allegations? It is in proof that the defendants’ house was frequented by persons of tender age and limited incomes, and who there hazarded not only more than they could properly afford to lose of their own, but actually staked the property of their employers, and *that* not unfrequently whilst in a state of intoxication. I can entertain no doubt that such persons, in such a situation, completely satisfy the meaning of the words “idle and disorderly,” and that their admission to the house in question rendered it a nuisance, and the maintenance of it an offence at common law. It is further in proof that persons, such as I have described, played at the game of “Rouge et Noir;” that 100*l.* notes are often staked at a single round by individuals, and that thousands were occasionally won by the defendants at that game in the course of one evening. The very essence of illegal gaming in the playing at the game to excess; the statute law, in some instances, limits the amount that can legally be lost or won at one sitting to 5*l.*; and can it then be doubted that the playing at this or at any other game to the amount I have mentioned, is excessive, and consequently illegal? I certainly have no hesitation in declaring that it is; and

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when I further take into consideration the very cautious mode of admission into the house—the double doors, and the guards stationed at them—the temptation held out to the visitors to indulge in liquors freely, gratuitously provided, even to intoxication, and the careful and constant sobriety of the proprietors, I cannot but see, on the one hand, a consciousness that the business carried on there was unlawful; and, on the other, a premeditated design to allure the unguarded to share in that business for the profit of the defendants alone. If it should be thought that this interpretation of the common law on this subject requires confirmation, I think it is to be confirmed from two sources; first, by the very numerous convictions which have taken place under common law prosecutions for similar offences; and, second, by the language of the statute 25 Geo. 2. c. 36. s. 5. where it is said, that “in order to *encourage prosecutions* against persons keeping bawdy houses, *gaming houses*, or other disorderly houses,” the expenses of such prosecutions shall be paid by the overseers of the poor of the parish in which the house indicted is situate, from which it is clearly to be inferred that the Legislature then meant to describe the keeping a common gaming house as a previously indictable offence. I am therefore decidedly of opinion that the indictment in this case is good in point of form; that it was substantially supported by the evidence; and consequently that there is no ground for the present motion in arrest of judgment.

BAYLEY, J.—I am entirely of the same opinion, and fully concur in the reasoning of my Lord Chief Justice upon the subject; to which I will only add, that the statute 58 Geo. 3. c. 70, is couched in similar terms, and evinces the same understanding on the part of the Legis-

lature as is manifested by the language of the previous statute of 25 Geo. 2. c. 36.

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HOLROYD, J.—I am also of the same opinion. I think the reasons which are given in *Hawkins* for the *dictum* which has been cited and objected to, are perfectly satisfactory, and go the full length of shewing that the offence charged in this indictment, and proved at the trial, is an offence at common law; and that the language of the statutes plainly indicates that the Legislature, in passing them, adopted and acted upon that idea. I can therefore see no pretence for the present application.

BEST, J.—I should be extremely sorry if I thought it possible for any unbiassed mind to entertain a doubt upon this subject. It is quite clear that any practice which has a tendency to injure the public morals, is a common law offence, and that I take to be the foundation of the *dictum* to be found in *Hawkins*. To me it is equally clear that the practices charged in this indictment, and of which these defendants have been convicted by a Jury, have such a tendency, and are therefore indictable in the present shape. With regard to the particular game described in the indictment, I think the name there given to it is perfectly immaterial; no game is unlawful in itself, but every game may be rendered so by playing at it for an excessive stake; for it is the amount played for, and not the nature of the game, which is the essence of it, and which constitutes it an offence in the eye of the law. But, as it seems to me, the consideration of that branch of the subject is not necessary, for there is quite enough charged in the indictment, and proved at the trial, to render these defendants guilty of a misdemeanor in the mere management of the house of which they were the proprietors.

Rule refused.



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The defendant *Rogier* was sentenced to pay to the King a fine of 5000*l.*, and to be imprisoned one year in the *Middlesex House of Correction*, and the defendant *Humphrey* to pay a fine of 200*l.* and be imprisoned in the same place of confinement for two years.

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JONES v. OWEN, Esq.

The statute 13 G. 3. c. 78. s. 60, imposing a penalty on the driver of a cart, &c. for riding thereon under the circumstances therein mentioned, authorizes a Justice on his own view, or upon the oath of one witness, to convict the offender, and in case the offender refuses to discover his name, or the name of the owner of the cart, &c. he is subjected to a like penalty, and may, without warrant, be apprehended forthwith by the person seeing the offence committed. Where the driver of a

**T**RESPASS for an assault and false imprisonment. The declaration was in the common form, but adding that the defendant struck two horses of the plaintiff, which were drawing a waggon of the plaintiff on the King's highway, "and stopped the said horses and the said waggon, and hindered the same from travelling in and along the said highway, by means whereof the plaintiff was hindered from performing his necessary affairs," &c. The defendant pleaded, first, the general issue; second, *son assault demesne*; and, third, as to stopping the horses and cart, &c. "that on, &c. at, &c. defendant was riding on horseback in and along the said highway, and that the said cart or waggon, drawn by the said horses, was then and there passing along the said highway; and that plaintiff was then and there unlawfully riding upon the said cart or waggon, and there not being then any person on foot or on horseback to guide the said cart or waggon, or horses drawing the same, and that defendant thereupon requested plaintiff to come down from the said cart or waggon, which he wholly refused to do, and on

waggon committed an offence within this act, in the view of a Justice, and having placed himself before the board on which his master's name was painted, so as to prevent the discovery of the owner, and the Justice, in order to ascertain the name, stopped the horses and laid hands on the driver, and removed him from his position before the board, and thereby informed himself of the ownership:—Held, on demurrer, that this was a trespass, and gave the driver a right of action.

the contrary thereof, placed himself upon the shafts of the said cart or waggon, behind the horse attached to the said cart or waggon, and immediately before the board on which the name of the owner of the said cart or waggon was painted, in order to conceal the name of the owner from defendant; and that defendant thereupon requested plaintiff to acquaint him with the name of the owner, which he wholly refused to do, and thereupon defendant requested plaintiff to move on one side of the said cart or waggon, in order that defendant might read the name of the owner, which was painted on the board in front thereof, with which said last-mentioned request he wholly refused to comply, whereupon defendant, in order to read the name of the owner of the said cart or waggon, so painted as aforesaid, and because he could not otherwise read the same, stopped the said cart or waggon, and the said horses so drawing the same, and hindered the same from travelling, &c. as he lawfully might for the causes aforesaid; and in order to read the name of the owner of the said cart or waggon so painted as aforesaid, and because he could not otherwise read the same, defendant gently laid his hands upon plaintiff, in order to remove him on one side of the said cart or waggon, and did remove him on one side thereof, as he lawfully might for the cause aforesaid," &c. Upon the first plea, issue joined; to the second, a replication *de injuriâ suâ*; and to the third, a general demurrer. Joinder in demurrer.

*Campbell*, in support of the demurrer was stopt by the Court, who desired to hear

*Patteson*, contrâ. This plea is a sufficient answer to the declaration, under the 60th section of the 13 Geo. 3. c. 78. In that clause it is first enacted, that any driver of a waggon, &c. riding thereon, not having a person on

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foot or on horseback to guide it, or refusing to discover the name of the owner, shall, upon conviction on the view of a Justice, or on the oath of one witness, be liable to a penalty of 10s., and second, that any such driver may be apprehended by any person seeing either of those offences committed. This clause therefore provides two separate modes of proceeding against an offender; the one by conviction upon view of a Justice, and the other by laying an information against him before a Magistrate. It is clearly left to the complaining party to adopt whichever of these modes he may, under the circumstances of the case, think most proper; for the statute does not compel the apprehension of the offender. Now in either mode of proceeding, the defendant was perfectly justifiable in the measures he took. If as a Magistrate, he intended to convict on his own view, it was absolutely necessary that he should obtain a sight of the board on the cart, in order to ascertain whom to convict; he could not know the name or person of the driver, and the only means of learning *his* name, was by discovering the name of his employer; and therefore in this view of the case, he was justified in removing the plaintiff from before the board. Again, if he intended to lay an information before a Magistrate, either for the riding upon the waggon, or for the refusal to discover the owner, the same measure was equally necessary; for without the knowledge which that act gave him, he could not know against whom to inform. He was not bound to apprehend the plaintiff. The power to apprehend is evidently additional and cumulative. He might not be physically capable of apprehending him, or he might not choose to risk a struggle in the attempt. Surely then, he was justified, for the ends of justice, in taking any step which would enable him to convict the party in the more convenient way. In either view of the case, therefore, the defendant was justified in laying hands

on the plaintiff, and as this plea is framed precisely upon the words of the Act of Parliament, and is large enough to comprehend both cases, it is clearly a good plea, and the defendant is entitled to judgment on demurrer.

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*Per Curiam.*—It is true that the statute provides two methods of proceeding against an offender, the one by conviction on view by a Justice of the Peace, and the other by information, upon the oath of one witness before a Justice of the Peace, and it adds the power of immediate apprehension by any person, for the purpose of enforcing the penalty. But the defendant in this case has unfortunately adopted a third course, for which the statute does not provide, and which this plea cannot justify, namely, that of stopping the horses, and of forcibly removing the driver from one part of the waggon to another. Statutes of this description, which provide an instant and summary remedy for offences so dangerous to the public, are highly beneficial; but they are extremely liable to abuse, and we must take care, that in enforcing them, parties adhere to the strict letter of the law. In this case two offences were completed, the riding upon the waggon, and the refusing to communicate the owner's name; for either of those the defendant might have convicted the plaintiff on his own view as a Magistrate, or have apprehended him as a private individual, for the purpose of his being dealt with according to law. He does neither, but lays hands on the plaintiff, and removes him from the cart. This he was not authorized by law to do; the act was an assault in law, and cannot be justified by the plea which he has put on the record. The plaintiff therefore is entitled to our judgment.

Judgment for the plaintiff.

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The KING v. The INHABITANTS of ROTHERFIELD GREYS.

Where a minor enlisted into the royal marines, and having been discharged from the service at the end of the war, before he attained twenty-one, returned to his father's family:—Held, that he was not emancipated.

**BY** an order of two Justices *Thomas Binfield* was removed from the parish of *Tooting Graveney*, in *Surrey*, to the parish of *Rotherfield Greys*, in the county of *Oxford*, and on appeal, the Sessions confirmed the order, subject to the opinion of this Court, on the following case:—

The pauper was born on the 22d *November*, 1794, in the appellant parish, where his father was settled. In the year 1807, the pauper's father removed with his wife and family, including the pauper, to the parish of *Tooting Graveney*, in the county of *Surrey*, and took a cottage there, which he has ever since held, at three shillings a week. The pauper resided with his parents at *Tooting Graveney* till 1813, when he enlisted in the marines, and went abroad in that service. He remained in the marine service till the 8th *September*, 1815, when, in consequence of the reduction of that corps, after the peace, he received his discharge. He returned the same day to his parents at *Tooting*, being then under the age of twenty-one years, and occasionally resided with them, working as a labourer on his own account, from that time until some time after the pauper's father hired a stable in *Streatham*. About a year after the pauper's return home, the pauper being then more than twenty-one years of age, his father hired a stable in the adjoining parish of *Streatham* at four shillings a week, which he held about nine months, still continuing to reside at the cottage at *Tooting Graveney*. The cottage and the stable together

were above the annual value of 10*l*. The pauper had never done any act to acquire a settlement for himself. The question for the opinion of the Court is, whether the paper was emancipated at the time of his father's gaining the settlement in *Tooting Graveney*. If so, the order of removal to be confirmed, otherwise the order to be quashed.

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*Thesiger*, in support of the order of Sessions, contended, that the pauper was emancipated by entering into the marine service, whereby he contracted a relation wholly inconsistent with parental control. This case was distinguishable from any hitherto decided, inasmuch as here the pauper had entered into the regular service, and was for life liable to be called upon at any time to perform his military duty. In this point of view all parental control merged in the contract into which the pauper had entered with his Sovereign, and nothing could restore him to the parental dominion. None of the cases of settlement under the head of emancipation would govern the present: Could the father in this instance claim his son, or prevent him from performing his duty as a marine, when called upon? If not, then his situation was repugnant to the idea of parental control. The cases of *Rex v. Walpole St. Peter's*(a), and *Rex v. Stanwix*(b), were distinguishable from this, because in both the paupers had respectively attained majority before they returned to their father's family. The latter case, indeed, was decided upon a different ground, as was observed by Lord Kenyon in *Rex v. Witton-cum-Twambrookes*(c), namely, that the pauper had contracted a relation inconsistent with the idea of a subordinate situation in the father's family. This distinction was also taken in *Rex v. Roach*(d). The

(a) Burr. S. C. 638. 2 Bott. 35.

(c) 3 T. R. 355.

(b) 5 T. R. 670.

(d) 6 T. R. 267.

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recent case of *Rex v. Wilmington(a)*, if any thing, was rather an authority in favour than against the present argument, because there *Abbott*, C. J. in enumerating the different modes by which emancipation was effected, observed, "that there is no emancipation during minority, excepting by marriage, becoming the head of another family, or contracting a relation such as *wholly and permanently* to exclude the father's control." Trying this case by the last-mentioned test, it was clear, that the pauper had entered into an engagement which had emancipated him wholly and permanently from the father's control, inasmuch as he had rendered himself liable to the control of the Crown during life. The question in this case was, whether enlisting into the army, when it was considered that the pauper was liable to serve for life, and it not being contemplated at the time that he would ever return to his father's family, did not constitute a complete and perfect emancipation. The Court were merely to look to the contract at the time it was entered into, and not to the subsequent circumstances which happened, to release the pauper from the obligation into which he had entered. In this case undoubtedly the pauper happened to be discharged from the marines before he was twenty-one, but that would make no difference in the application of the principle now contended for, because the Court must look to the nature and effect of the contract at the time it was entered into. Enlisting into the army was contracting a relation which destroyed the parental control, and effected a complete emancipation, though the pauper might afterwards return to his father's family. The case of *Rex v. Woburn(b)*, did not shake this principle. In that case the pauper enlisted as a drummer in the same regiment of militia in which his

(a) Ante, 46.

(b) 8 T. R. 479.

father was a serjeant, and the Court held, that he was not emancipated, but for a plain reason, namely, that the enlistment was merely a temporary suspension of the father's control. Here the pauper had enlisted in permanent service as a marine, and had the prospect of being a soldier for life. In that respect the difference between the militia and the regular service was apparent, for in the one the contract was to continue for life, but in the other it was only for a given time, and the soldier was only called upon occasionally to do duty. This distinction was taken in *Rex v. Woburn*; and the case of *Rex v. Hardwicke (a)*, decided, that even the service of a militia-man until the age of twenty-one, worked emancipation.

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Barnewall, on the other side, was stopped by the Court.

BAYLEY, J.—It is quite clear in this case that the pauper did not contract such a relation as effected his emancipation. In order to constitute emancipation, the son is to be wholly and permanently free from the father's control. Entering into the army, subjects him to the control of the Crown, so long as he continues in that service; and if he remains in the army until after he is of the age of twenty-one, then his emancipation is perfect, and it would relate back to the time when he originally enlisted; but if before he attained majority he was released from the service, though he became *sui juris* with respect to his military engagements, yet he would become liable again to the control of his father; and if he returned to his father's roof, he would become a member of his father's family, and consequently remain unemancipated. If reference is had to the old authorities, the

(a) 5 B. & A. 176.

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principle will be found to be uniformly the same. The opinions of Lord *Kenyon* and *Lawrence*, J. in *Rex v. Roach* are perfectly consentaneous with this doctrine, and in unison with the general rule laid down in the recent case of *Rex v. Wilmington* by *Abbott*, C. J., who was extremely desirous of doing that which, in all settlement cases, is most desirable, namely, of laying down something like a plain and general rule, which should not be open to nice exceptions. He says, "It is of great importance to lay down some general rule upon this subject, in order to exclude discussions of this kind in particular cases, and I own it appears to me, the best general rule to lay down is, that there is no emancipation effected during minority, excepting by marriage, becoming the head of another family, or contracting a relation such as *wholly and permanently* to exclude the father's control." Entering into the army is certainly contracting a relation which will wholly and permanently exclude the parental control, provided he remains in the service until after twenty-one; but if he be discharged from the service before he attains that age, and returns again to the father's family, then he has not contracted a relation (according to the events which afterwards occurred) which wholly and permanently excluded parental control. So that, according to the spirit of that decision, this pauper could not be emancipated. In the case of *Rex v. Hardwicke*, where the pauper served in the militia for five years, my Lord Chief Justice says, "The rule of law is, that every new settlement acquired by the parent is communicated to the children, so long as they remain members of his family; and the question in this case is, whether, at the time when the father gained his settlement in *Stanton Harcourt*, this pauper remained a member of his family? Now, during the minority of the child, he will remain almost under any circumstances unemancipated; but where the new


settlement is acquired by the parent after the child has attained twenty-one, it will not be communicated, unless in fact the child continues one of the family." In this case, the pauper is for a time taken from under the parental control; but being discharged from the marines, and being then under the age of twenty-one, he willingly submits himself to the control of his father. According therefore, to the authority of that case, he continues a member of the family, and consequently his father's settlement is communicated to him. On these grounds, the order of Sessions must be quashed.

HOLROYD, J.—I am of the same opinion. I think the son cannot be considered as emancipated, inasmuch as he had returned to the parental control before he attained twenty-one. The father by law has a right to the control of his child until he is of age, unless some other engagement entered into deprives him of such right. Entering into the army may be considered as an engagement for life, inasmuch as no definite period is mentioned at the time of enlistment, and the party could not leave without the consent of the Crown. If the soldier remained in the service until twenty-one, he would then be completely separated from his father's family, and a perfect emancipation effected; but the ground on which we decide that there is no emancipation in this case is, that before twenty-one the pauper was discharged from his engagement, and returned again to the father's control. So that by mere enlistment the father's control is not wholly gone; it only remains in abeyance, and therefore, if by any accident the infant is released from his engagements to the Crown before twenty-one, the father's control revives, and the emancipation is not effected. It is argued, that by enlistment the pauper rendered himself liable to serve for life, and thereby the emancipation became complete.

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The enlistment, however, is not to be considered in that light. When the soldier enlists, he is undoubtedly liable to serve for life; but it does not follow that he will be called upon so to do; for the Crown may think fit to discharge him from the engagement entered into; and in that case it is not a service for life, but only for such period of time as public exigencies may require his services. If it were to be considered as an engagement to serve for life at all events, there might be some weight in the argument; but as the engagement may or may not last, according to circumstances, I think the observation falls to the ground. Here the pauper is released before twenty-one, and therefore, with respect to the law of settlement, he stands in the same situation as if he had never been in the marines.

BEST, J.—I think the pauper was not emancipated at the time his father acquired his settlement in the parish of *Tooting Graveney*, and therefore the order of Sessions must be quashed. There is no doubt, that by the policy of *English* law, the parental authority continues until the child attains twenty-one; but by the policy of the same law, if the country requires the services of the infant, he is at liberty to contract an engagement paramount to the parental control, and subject himself to the dominion of those persons who are put in authority over him. That engagement may or may not last for life; but if it is dissolved before twenty-one, the parental authority comes again into operation, and the son continues, for the purpose of settlement law, a member of his father's family. The pauper in this case comes precisely within the scope of this principle, which is fully supported by the cases of *Rex v. Roach* and *Rex v. Wilmington*.

Order of Sessions quashed.

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The KING v. The INHABITANTS of FERRYBRIDGE.

ON appeal by *Richard Rhodes Milner*, Esq. against a rate or assessment for the relief of the poor of the township of *Ferrybridge*, in the West Riding of *Yorkshire*, the Sessions ordered the rate to be amended, by striking out a portion of it, assessed upon the appellant, amounting to the sum of 16*l.* 16*s.* 10*d.* in respect of his woods and plantations, subject to the opinion of this Court upon the following case:—

The appellant is the occupier of 650 acres of land in *Ferrybridge*. It appeared in evidence, that in the years 1785 and 1786, 340 acres of the said land were planted with oak and ash, closely intermixed with *Scotch* firs and larches. At different periods, portions of the firs and larches were cut down for the purpose of thinning the plantations, and some of these thinnings were sold under the name of fir and larch poles, but the greater part were used in the erection of buildings. Considerable thinnings of the firs and larches have been made within the last four years, and produced a profit. Many of them were of the height of from thirty to forty feet, and contained from ten to twelve cubic feet of wood, and were thirty years old. This wood was cut without reference to size, in order to allow room for the oaks and ashes to spread. The purpose of introducing firs and larches into these plantations, was to keep the same thick and sheltered, and to make a profit by cutting the firs and larches from time to time, when the oaks and ashes, by reason of their growth, required more open space. Fifteen years ago, eighteen other acres of the said land were planted in a like manner; and five years ago seventeen other acres of the said land were also planted in a like manner. The eighteen acres had been thinned by cutting

Where firs and larches were planted with oak and ash trees, principally for the purpose of affording a screen or shelter to the latter in their infancy, and were cut from time to time as the oaks and ashes required more room to spread, and when once cut did not spring again, and although, when sold, they yielded a profit:—Held, that they were not saleable underwood within the statute 43 Eliz. c. 2. and therefore not rateable to the relief of the poor. *Qu.* Whether under any circumstances firs and larches can be considered underwood?

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out a portion of the firs and larches, but no profit was derived from such thinning. The seventeen acres have not yet been thinned. The roots or boles of the firs and larches which are cut, die in the ground and produce no shoots. The whole of the land so planted has always been rated to the relief of the poor. Upon these facts the Court of Quarter Sessions was of opinion that this was not that species of wood liable to be rated to the relief of the poor, and directed the rate to be amended, by striking out such part of it as was assessed upon the said appellant in respect of the whole 375 acres.

E. Alderson (with whom was *Bland*), in support of the order of Sessions. The question is, whether the fir and larches mentioned in the case, are saleable underwoods within the meaning of 43 *Eliz. c. 2*. According to decided authorities they clearly are not. In *Rex v. Mirfield*(a), and *Aubrey v. Fisher*(b), questions respecting saleable underwood came under the consideration of this Court. Lord *Ellenborough*, C. J. in the former case, speaking of saleable underwoods, within the meaning of the statute of *Elizabeth*, says, "amongst the several descriptions of persons whom this statute makes rateable, the occupier of *saleable underwoods* is one, and the question is, whether they can be deemed *saleable* underwoods except in the year in which they are cut down. The word *saleable* has not a very precise definite meaning; it may mean when they are in a fit state for sale, referring to the time when they are cut; or it may mean such as are intended or destined for sale, in contradiction to such as are to supply the land with estovers for fuel, and the other purposes of the estate. In the former of these cases they would only be rateable in the year in which they are cut; in the latter they would be rateable at all times; and we think, after full consideration of the sub-

(a) 10 East, 219.

(b) *Id.* 446.

ject, that the latter is the proper meaning." According to this definition, saleable underwoods are those only which are originally destined for sale, and the primary object of planting which is, sale, when they are fit to cut. In this view of the case, a definite and precise meaning is given to the words "saleable underwood." This means not such woods as may happen in fact to have been sold, but such as are saleable. To bring this case within that definition, therefore, it must be shewn that the original intention of cultivating the land in this manner was with a view to sell the firs and larches when they were cut. Now the fact is, that the primary object was not to derive a profit by the sale, but to afford a protection or screen to the young oaks and ashes, planted for the purpose of becoming timber. In the case of *Aubrey v. Fisher*, the question was, whether beech trees in *Buckinghamshire*, were saleable underwood according to the custom of that county. Upon the trial, *Heath, J.* told the Jury, that the only question for their determination was, whether the plaintiff's wood was saleable underwood; and as all the witnesses agreed that it was not underwood at all, and was differently managed, and clearly distinguishable from underwood, they ought to find a general verdict for the plaintiff, which they accordingly did. There, the question chiefly turned upon the mode of management, and as it appeared that the practice was to cut down the larger, and leave the smaller wood, it was held that the trees in that case were not underwood. Considering the mode of management, therefore, as the criterion, it is quite clear that the firs and larches in this case cannot be deemed underwood. Here the larger trees are cut down, in order to leave room for the oaks and ashes to grow up as timber. Undoubtedly they are not thrown away as useless; but admitting that they were sold, still the fact of sale does not make them saleable

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according to the definition given in *Rex v. Mirfield*. The Court are to look to the original intention of planting. It is clear, that they were not originally intended for sale; they were planted for a totally different purpose, a purpose inseparable from the principal object, namely, the cultivation of the timber trees. The mode of management shews clearly that the proprietor of the land never intended them as an object of sale. They are not cut with reference to their own growth, but entirely to that of the timber trees, in order that additional room may be given to the latter when it becomes necessary. If it were intended by the proprietor to derive a profit from the sale of the firs and larches, a very different mode of management would have been adopted. Instead of cutting them down at uncertain periods, according as the timber trees grew up and required more space, he would have felled them at stated periods, and standards would have been left at certain intervals. But the very nature and character of this species of wood negative the notion of underwood. When the firs and larches are once cut, the trees are absolutely destroyed, and the bole dies in the ground, never again to shoot. This is an important view of the case, when considered with reference to the statute 35 *Hen. 8. c. 17*, which was passed for the preservation of woods, and was made perpetual by 13 *Eliz. c. 25*. That statute prescribes the mode in which coppice or underwoods shall be managed, and there is an express provision made for the preservation of what are called the springs of the wood from which the underwood is to be renewed. This can never be construed to apply to fir trees, which are known never to grow again when once cut down. The total annihilation of the fir tree, when severed from the root, was indeed the subject even of a proverb amongst the ancient *Greeks*. It is obvious, there-

fore, that when these statutes speak of underwoods, they refer entirely to woods of a renewable nature, and not such as are perishable. Firs and larches are clearly not renewable, and therefore do not fall within the scope of those statutes. The Legislature, at the time the 43 *Eliz.* was passed, must also have had this in contemplation when they used the words "saleable underwoods," because the object of that statute is only to make such property rateable as yields an annual profit. [*Bayley, J.*—Coal mines are included.] They are mentioned specifically, but though they may not, strictly speaking, produce an annual profit, yet they are a species of property upon which an annual computation of profit may be made, so as to make them the subject of a rate; and that is one of the reasons assigned in the books why they are liable to an annual rate. Upon the same principle sand pits, lime pits, and other property of that description are rateable. They are made the subjects of rate because their annual value is matter of easy calculation. Now in this case, how is the annual value of the firs and larches to be estimated? They are not cut at stated intervals, but according as the oaks and ashes require more room. They do not yield an annual profit, and unless they do they are not rateable; for, according to *Rex v. Mirfield*, they are rateable according to their annual value, and not with reference to the year in which they are felled. Here it is impossible to fix any annual value upon which the *quantum* of rate can be assessed, because there is no certain rule for felling. In one year, only a few may be cut, and in another a greater number, but in every instance the motive for cutting is the due cultivation of the oaks and ashes. When an oak happens to be incumbered by a fir, the latter is immediately cut down, whether it be great or small.

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The Court stopped him, and called upon

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Milner, in support of the rule for quashing the order of Sessions. Firs and larches, managed in the way stated in this case, are rateable to the relief of the poor, within the statute of *Elizabeth*. The Court are now called upon, for the first time, to decide that every species of wood which is not *timber*, is not liable to be rated. In the cases of *Aubrey v. Fisher*, and *Rex v. Mirfield*, that point did not come under consideration; they were decided upon their own peculiar merits, without involving the general question. With respect to the mode of management, as the criterion of determining what is and what is not underwood, the case of *Aubrey v. Fisher*, as far as it goes upon that point, is an authority in favour of the present argument, because it was there said, that "the beech poles could not be considered saleable underwood, but timber, because there the larger wood was cut down, and the smaller was left to grow." No distinction is made here, as to the uses to which the firs and larches are to be put. The plantation is made of oaks and ashes, and the firs and larches are merely subsidiary, being planted for the purpose of sheltering the former, and also to make a profit by the sale of them. The firs and larches are managed in the usual way, and are cut down year after year. During the last four years it is found by the case, that they were regularly cut and sold at a profit. Upon this state of facts the question is, whether such wood is not liable to be rated. The policy of the statute of *Elizabeth* is to make as much property as possible rateable to the relief of the poor, and the Court will give effect to that object in the present case. They will not draw nice and subtle distinctions, but will establish one general rule, which shall include all descriptions of productive property, so that the burthens of the parish

shall be equally divided amongst the inhabitants. If the Court should hold, in this instance, that firs and larches are not rateable, the consequence may be very injurious to the other parishioners, for if the proprietors of poor lands find that this is the most profitable mode of managing their estates, and they can thereby exempt themselves from poor-rates, one-half of the parish may be turned into such plantations, and the burthen of maintaining the poor will be thrown upon the other half. The principle running through all the decisions upon this statute, is to extend it to every species of property which can be fairly included within its operation. This has been the principle governing the Court in questions as to the rateability of mines, tolls, and other productive property of that description. If it be conceded, then, that firs and larches are productive property, there seems to be no sensible reason why they should, more than any other property, be exempt from rateability. Under the words "saleable underwood," may be comprehended every species of wood which is not *timber*, either by the common law of the land, or the custom of the country. There is no custom stated in this case, the firs and larches are timber. Some trees may be timber according to the custom of the country, though not so at the common law, and unless it is found in this case that firs and larches are timber by the custom, the Court cannot infer it, from the uses to which they may happen to be applied. The popular meaning of underwood cannot govern this case; the Court must have regard to its meaning, as found in the common and statute law. There is a distinction taken in the statute 45 *Edw. 3. c. 3*, between "*silva cædua*," and "*gros bois*." That statute recites, that "at the complaint of the great men and commons, shewing, by their petition, that whereas they sell their great wood of the age of twenty years, thirty years, forty years, or of greater age, to merchants,

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to their own profit, and in aid of the King and his wars, parsons and vicars of holy church, implead and draw the said merchants in the Spiritual Court for the tithes of the said wood, in the name of these words called '*silva cædua*,' whereby they cannot sell their woods, to their great damage, &c." and then enacts, "that a prohibition shall be granted as to *gros bois*." In commenting upon this statute, Lord Coke, in 2 *Inst.* 648, gives the definition of those woods to which it is applicable. He says, "It appeareth before that, all the bishops claimed only tithes *de subbois*, of underwood under the name of *silva cædua*, so as of *haut bois* of great wood, no tithes were claimed, but herein rested two doubts, 1. What should be said high or great wood; 2. Of what age the same should be, because it is parcel of the inheritance." In continuation he observes, "and it is to be understood that this act useth these words *grosse boyes*, and not *haut boyes* or *graund boyes*, which word is also used in the books of 50 *Edw.* 3. and 9 *Hen.* 6; and in this act this word *grosse* signifieth specially such wood as hath been, or is either by the common law or custom of the country timber, for this act extends not to other woods, that have been or will not serve for timber, though they be of the greatness or bigness of timber." From this it appears, that all wood which is not timber either by common law, or the custom of the country is titheable, and therefore comes under the definition of *silva cædua* or underwood. By the common law oak, ash, and elm only are timber. Where, by the custom of the country, other woods, such as birch, aspen, horse-chesnut, &c. are said to be timber, the question is to be tried by an issue. *Walton v. Tryon* (a), *Bibye v. Huxley* (b), and *Com. Dig.* (c). It is not the use to which the wood is put which makes it timber; for timber or not timber depends upon the custom of the country.

(a) 2 Gwil. 827. S. C. Amb.  
 130.

(b) Bunb. 162.  
 (c) Tit. Dismes, H. 3.

*Rex v. Minchinhampton*(a). To whatever purpose it may be applied, does not alter its character, unless it be either timber by the common law, or timber by the custom of the country. Neither does the age of the wood make any difference. In *Goodhall v. Perkins*(b), it was held, that alder-poles, though of trees above twenty years standing, were not timber, but titheable as *silva cadua*. So in *Turner v. Smith*(c), stub-oak, and ash above thirty years old, which were not considered timber in the county of *Essex*, were held to be titheable. But the substantial question in this case is, whether a profit has been made of these trees. It is expressly found that for the last four years a profit has been made of them, and it signifies little to what purposes they have been applied, whether to building, husbandry purposes, or sale. In *Chamber's Cyclopædia*, and *Jacob's Law Dictionary*, the definition given of underwood, includes coppice and all other woods not accounted timber. These and the other authorities referred to, go to shew that the Court are not bound by any technical understanding of the words "saleable underwood;" nor tied down by any statutable definition of underwoods. It is sufficient if these trees produce a profit to the cultivator, to bring the case within the statute of *Elizabeth*, which in modern times has received a liberal construction, with a view to the equalization of parochial rates. Considering, therefore, the extent to which plantations of this description are carried, and that if these trees are not held rateable, the whole burthen of the poor-rates may be thrown upon the rest of the township; considering also, that whether the Court looks to the strict definition of underwood, or to the implied exemption, those trees, under the circumstances of the case, may fairly be considered as saleable underwoods, and therefore rateable to the relief of the poor.

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(a) 3 Burr. 1308.

(b) 2 Gwill. 543.

(c) Ibid. 529.

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BAYLEY, J.—I am of opinion that the order of Sessions must be confirmed. The statute 43 *Eliz. c. 2*, does not throw the charge upon every description of property, but points out particular descriptions which are to be subject to the poor-rates, and those are “lands, houses, tithes impropriate, appropriations of tithes, coal-mines, or *saleable underwoods*.” The statute does not use the word “*underwoods*” per se, but adds the qualification “*saleable*.” Now, if before that act, there had been any statutable exposition of the word “underwood,” or if that term had, from time to time, occurred in different Acts of Parliament, so that the Court could have seen in what sense the Legislature had used it, then we should apply it in the same sense in construing this statute. But the industry of the defendant’s counsel has not enabled him to find that word occurring, so as to give it a legislative meaning, prior to the statute to which our attention is now directed. It has been argued that all wood, not being timber by the common law, or the custom of the country, must be considered underwood, and consequently as firs and larches are not timber, they must be treated as underwood. Whether that is such a view of the subject as properly applies to the statute of *Elizabeth*, it is not necessary in this case to decide, because that statute does not speak of underwood per se, but of *saleable* underwood. If the definition urged in this case be correct, it would bring under charge a great number of trees which never have, in the general understanding of the word, been considered underwoods, and rateable under that denomination. According to this definition, lime trees, avenues of horse-chesnuts, and aspen, might be considered underwood. So of other descriptions of trees, such as plane trees, maples, and horn-beams, which, generally speaking, have never been considered as falling within that description. Certainly,

according to my understanding of the word, I should have thought it a perversion of language to call these underwoods. I know what coppice wood is, and I know, that generally speaking, coppice wood and underwood are used synonymously, and that the application of these terms is in a great degree governed according to the purposes for which the wood was intended, and the objects to which it is applied. Common underwood is a description of wood which grows expeditiously from one and the same stool, and from which a great many different shoots arise in succession, and cutting down which does not destroy the principle of vegetation, but leaves the roots to send up a fresh supply of stems. In the general understanding of mankind, I believe that this is the definition of underwood, and I am disposed to think that that is the description of underwood to which the statute of *Elizabeth* properly applies. But whether that be so or not, we find the word *saleable* in that statute, and I think by the words “saleable underwood,” which were under consideration in *Rex v. Mirfield(a)*, we are not to consider that as saleable underwood which is in a fit state to be sold, but such as was originally intended or destined for sale, in contradistinction to such as was to be used for fuel, and other purposes of the estate. I am of opinion, that the proper construction of the words “saleable underwoods,” is that description of underwood, of which, at the time it is originally planted, future sale is one of the main objects of its culture. When, therefore, we find that it is clearly destined for a perfectly different purpose, I think we are not at liberty to consider it as coming within the denomination of saleable underwood. There are many places in which, from the nature of the wood, it can only have been intended for underwood. Hazels, for instance, can never be intended, and from

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(a) 10 East, 219.

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their nature cannot grow up, to be large trees, and yet are extremely valuable for underwood. Where there are large plantations of this description, the very nature of the wood imports that they must have been planted for profit by sale, and that sale was the chief object of their cultivation. But what is the case with respect to firs and larches? Trees of that description are, I believe, the least valuable which can be planted. In general, the principal object of planting them is for the purpose of shelter, and not of deriving profit by sale. This case finds expressly that the original object of planting the firs and larches was to afford protection to the oaks and ashes, which are trees of a slower growth, and require shelter in their infant state. Shelter and protection were therefore the primary objects. When the larches and firs are cut, what is the purpose in view? They are cut for the purpose of thinning the plantation, and giving more space to the oaks and ashes in their progressive growth. It is conceded then, they are not cut expressly with a view to sale or profit. If these were the objects, and the proprietors wished to cut down his firs and larches when the price was high, what would be the consequence? His oaks and ashes would be exposed to the weather, and the most valuable part of his plantation, perhaps, destroyed. But it is quite obvious that these trees were planted merely for the purpose of shelter in the first instance, and of thinning when the young timber trees required more space. Some of these trees, it is true, were sold for profit, and it appears that many of them were from thirty to forty feet high. Certainly trees of such a height do not accord with one's notion of underwood, in its popular sense and acceptation. But we are not to consider this case with reference to the height of the trees, nor to the actual purpose to which they have been applied when cut; we must look to the primary object

for which they were originally planted. It is quite clear that profit was not the sole, nor even the principal object of planting these trees, and the fact of afterwards selling does not make it saleable underwood within the statute of *Elizabeth*. I think it would lead to the most mischievous consequences, if property of this description were held liable to be rated. It is a great national purpose to encourage the growth of timber. The proprietor of an estate, when he dedicates his land to the growth of timber, foregoes all present profit, and looks to remuneration at a distant period. If this is to be considered saleable underwood from the time it is planted, then, according to *Rex v. Mirfield*, it must be rated not merely in the year in which it is cut down, but in every year in which it is growing. Such a result would be most injurious and unjust. Here the proprietor of an estate devotes 340 acres of his land principally to the growth of timber, and, with a view to encourage the growth, he plants, at an enormous expense, a considerable quantity of fir and larch. Is he then to incur not only that expense, but also to subject himself to an annual charge upon the firs and larches, when the period is far distant when he will derive any profit from his plantation? I cannot think it was the intention of the Legislature, in passing the 43 *Eliz.* to bring into charge property of this description. In general, that statute seems to contemplate that description of property which annually yields a profit. This is property which in general yields no annual profit. It may be true that the firs and larches were originally planted partly with a view to profit, but the main object was the protection of the timber. For these reasons it appears to me, that, whether this be underwood at all or not, it is not to be considered saleable underwood within the meaning of the statute.

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HOLROYD, J.—From the statement of this case, it appears to me that these cannot be considered “saleable underwoods” within the meaning of those words, as used in the statute of *Elizabeth*. Considering those words in the sense of which they are used, I apprehend they must be understood in their general and popular sense, unless it can be made to appear, from other parts of that statute, or from other statutes, that they were intended to have a more extensive construction. It has been argued, with great ingenuity, that under the denomination of underwood, is to be taken all wood which is under the quality of timber, and has not become timber. I cannot agree with that argument; for, according to the decision of the Court, in *Rex v. Mirfield*, that notion was never entertained. It certainly is not agreeable to the general understanding of the word. The term “underwood,” according to general understanding, is more applicable to what is called coppice wood, in contradistinction to *haut-bois* or high wood, and is not considered as extending to all wood which is not timber. The great division is *hautbois* and *subbois*. There are three species of wood, which, by the common law, are timber, oak, ash, and elm; but if the enlarged interpretation now attempted to be given to the word “underwood” were to prevail, it would extend to beech, aspen, horse-chesnut, lime and walnut trees, in those places where they are not timber by the custom of the country. I think, however, that the construction of the word is not to be taken to this extent. But even if firs and larches came within the definition of underwood, still if they did not satisfy the description of “saleable” underwood, they would not be rateable under the statute of *Elizabeth*. Now if we look to the different objects of rate in that statute, they are such as generally yield an annual renewal of profit. That may be said even of a coal

mine; for when once it is opened, it affords a renewal of profits as long as it is worked. Underwoods are in general considered as yielding an annual profit; and though in fact they are not cut annually, yet there are successive renewals of profit, upon which a rate may attach. Firs and larches are clearly not underwood in this point of view, because when once they are cut, the roots die in the ground, and there is no renewal of profit. One mode of ascertaining whether these can be considered saleable underwoods, is to look to the objects to which they are applied, and the mode of management adopted from time to time. Now the case finds, that the principal object of planting was to afford shelter and protection to the oaks and ashes, which are more valuable trees. When the firs and larches were cut, it was not to make a profit of them, but expressly for the purpose of giving more space to the young timber trees. It may be true, that the thinnings were carried to a profitable account, but the main object of thinning the plantation was in aid of the cultivation of timber trees, to which the proprietor looked as the principal source of advantage. Occasional profit seems only to have been derived; for on one occasion, when eighteen acres were cut, no profit was made of them. This fact shews that the original purpose of planting them was not solely with a view to profit, but principally as a shelter for the oaks and ashes. Therefore, even supposing the trees came under the denomination of underwood, still they are not *saleable* underwood within the meaning of this statute, and are consequently not rateable.

BEST, J.—I am of the same opinion. It has been urged very properly, that the statute of *Elizabeth* ought to receive as extensive a construction as possible, because

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by extending its operation, and embracing more rateable objects, the burthen of parochial taxation will be more equalized. I entirely concur in the truth of that observation, and if the Legislature could have contemplated at the time this statute was passed, that new descriptions of property would have come into existence, it is highly probable that terms more extensive than the statute contains, would have been introduced to embrace this description of property. But we are to construe the statute as we find it. The statute only applies to such property as in fact produces, or may be considered as producing, some annual profit. The subjects enumerated are lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods. It is to be observed, that when this statute was passed, saleable underwoods were much more in use than at present. At that period, underwood constituted the chief fuel of the country, and was cultivated in great abundance in the neighbourhood of towns. In more modern times, coal has been brought into use, and underwoods have been grubbed up, and the land turned to a more useful account. The first four subjects of rate mentioned in the statute, are clearly such as yield an annual profit. Why coal mines were so specifically mentioned may reasonably be accounted for. When the framers of the act proposed to rate underwood, it was no doubt upon the principle that it produced an annual profit. Upon which, it would be very naturally suggested, "If you rate underwood, why not rate coal mines, which produce a profit to the owner of the soil." It is highly probable that it was upon some such suggestion as this, that coal mines were introduced into the statute. Coal mines, when worked, do produce something like an annual profit, and are therefore very properly the subject of rate. Now the question arising in this case

is, what description of underwood was meant by the Legislature when the statute was passed. It is argued, that every species of wood which is not, properly speaking, timber, must be considered underwood, and therefore rateable. I think the true construction of this statute will not support that argument. The Legislature have expressed themselves most accurately, for the purpose of shewing what they intended. They have not confined themselves simply to the use of the word "underwood;" for if they had, that would have let in the argument now urged; but they have qualified the use of the term "underwood," by introducing the word "saleable," thereby shewing that they did not mean every species of wood which is not timber. By the words "saleable underwood," is clearly meant that description of wood which, when once planted, and after being cut, produces new shoots, which at regular, certain, and known periods, may be cut down and sold for a profit. These are the sorts of wood which were contemplated, and which come as nearly to an annual produce as possible. The Legislature never could intend by these words, to comprehend perishable trees, which, when cut down, are no longer profitable, producing no new shoots, and yielding no renewal of profit from the stools. It is true in this case, that the cuttings of the firs and larches produced a profit; but it is not every thing that produces a profit which is rateable. The wood which is to be rated is that upon which a profit can with some degree of certainty be calculated at the time when it is planted. From underwood, properly so called, the cultivator may calculate, with some degree of certainty, upon deriving a profit; but that is by no means the case with respect to firs and larches. Now here the cultivator of the firs and larches did not originally contemplate a profit by the sale of them. He did

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not plant for the purpose of sale merely. It is found in the case, that they were planted expressly for the purpose of nursing the young timber trees, which would be destroyed by the wind, unless they had the protection of other trees of a quicker growth. Profit may undoubtedly have been made of them, but that was a secondary consideration; the primary object was the cultivation of the timber, to which the proprietor looked, as the source of remuneration for his trouble and expense. I agree with my Brother *Bayley*, that if this species of property were to be made the subject of a poor rate, it would have a direct tendency to check the cultivation of timber, because no man would embark his property in undertakings of this nature, which hold out only a remote prospect of advantage, if in the mean time his plantation is to be subject to a permanent rate. It has been argued, that this case may be compared to the liability to pay tithes. This is not at all like a case of tithes. Every species of wood which is not timber by common law or custom, is titheable; but there cannot be a custom to impose poor rates upon a species of property which was never considered a subject of rate. No resort has been had to any other definition of underwood, than that which is given by Lord *Coke*; but I think that definition does not help the argument. We all know that underwood is generally let to the tenant of a farm, and when that is the case, a stipulation is introduced into the lease that the tenant shall be at liberty to cut underwood at ten or fifteen years' growth; but could it be argued, that within the spirit of this permission, the tenant might cut down his landlord's fir plantation? In such a case a Judge would, I apprehend, have no difficulty in telling the Jury, that fir plantations did not come within a

license to cut underwood. If, however, this is to be considered underwood, still it is not *saleable* underwood within the statute, and cannot be rated.

Order of Sessions confirmed (a).

(a) See Year Books, 40 Edw. 3. 25. 42 Edw. 3. 6. 50 Edw. 3. 10. 7 Hen. 6. 38. 11 Hen. 6. 1. Stat. 35 Hen. 8. c. 17. s. 13. Godb. 4. Cro. Eliz. 1. 413. 4 Rep. 31. Moore, 355. Co. Lit. 58. Jenkin's Cents. 274. Cro. Jac. 514. Moore, 812. and Bro. Abr. tit. Waste, 21.

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### The KING v. WEIR and Others.

**INDICTMENT** against the defendants for assaulting *James Ritchie*, one of the constables of the parish of *Woolwich*, in the due execution of his office. Plea, Not Guilty. At the trial before *Richards*, C. B., at the *Kent Summer Assizes*, 1822, it appeared that the defendants were servants of the *Kent Water Works Company*, having the superintendence of their steam engine and premises, situate in the parish of *St. Paul, Deptford*. The company having been assessed by the Commissioners under the *Woolwich Poor, Paving and Watching, and New Gaol Acts*, refused to pay the assessment, upon the ground that they were not legally rateable, and consequently a distress was levied upon their premises at *Deptford*, under a warrant directed "To *Charles Sargent*, one of the collectors of parochial rates of the parish of *Woolwich*, in the county of *Kent*, to the constables of the said parish, and to all others, his Majesty's officers,

If a warrant be directed to a constable by name, he may execute it any where within the jurisdiction of the Magistrate; but if it is directed to him by his name of office, he can execute it only in the parish, &c. of which he is a constable. Therefore where a warrant for levying a rate was directed "to the constables of the parish of *W.*, and to all others, his Majesty's officers whom these may concern,"

and a constable of *W.*, in attempting to execute it in the parish of *D.*, was assaulted :—Held, that the assault was justifiable.

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whom these may concern." On the 18th of *June*, 1821, the prosecutor *Ritchie*, with an assistant, entered the premises, in execution of this warrant, when they were forcibly expelled by the defendants, without being able to effect their object. This was the assault complained of. It was objected for the defendants, that as the warrant was directed to the constables of *Woolwich*, and all other constables generally, the prosecutor, who was a constable of *Woolwich*, was, by the language of the warrant, limited to act within the jurisdiction of that parish only, and had no authority beyond it; and that consequently, as he had served the warrant in the parish of *St. Paul, Deptford*, he had acted illegally, and the indictment could not be sustained. The case of *Blatcher v. Kemp(a)*, was cited in support of the objection, which was over-ruled, but the learned Judge reserved the point for the consideration of the Court upon a motion to enter a verdict of Not Guilty, and the defendants were found Guilty.

Marryat, in *Michaelmas* Term last, obtained a rule nisi to set aside the verdict of guilty, and enter a verdict of not guilty.

Taddy, Serjt., *Andrews*, and *Claridge*, now shewed cause. There is a manifest distinction between the present case and *Blatcher v. Kemp*. There the warrant was directed to each constable of the county within his own district, and consequently each was limited to his peculiar jurisdiction; here, the warrant is directed generally to all the constables of *Woolwich*, and to all others, and the prosecutor being one of those constables, was authorized to act any where within the county of *Kent*. The

(a) 1 H. Bl. 17, note.

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language of the warrant does not restrict any one of the parties to his own particular parish, and where the direction is to particular constables, it is quite immaterial whether they are mentioned by their names, or by their descriptions as constables of any particular place. This very distinction is taken by Lord *Mansfield*, in *Blatcher v. Kemp*. There does not appear to be any case in the books precisely similar in its circumstances to the present, neither is there any case to be found, in which it is held, that such a description of the constable as the present is insufficient to give a general jurisdiction over the county at large. The office of a constable is the material part of his description, and is at least as extensive as that of his name. Where a warrant is directed to all the constables of a county generally, each is undoubtedly limited to his own parish; but it is not so here. The *designatio personarum* here is full and distinct, and must clearly be intended to cover the entire jurisdiction of the Magistrates under whose authority the constables are to act. The authority of Lord *Hale* (a), seems to support this construction; for he says, "If a warrant be directed to the constable of *D.*, he is not bound to execute it out of the precincts of his constablewick; but if he doth, it is good." And again, "If a warrant be directed by a Justice of Peace to the constable of *D.* to arrest a felon, he is not bound to go out of the vill where he is constable to execute the warrant; but yet if he do execute it in another vill it is good enough; for he acts herein not simply as constable of *D.*, but by virtue of the Justice's warrant." (b) It is true that this is said in cases of felony, but the principle seems to be the same, and to be equally applicable to civil process, and it is recognized in the more recent case of *Rex v. Kendall* (c), by *Holt*, C. J.,

(a) 1 Hale's P. C. c. 50, p. 581.

(c) 5 Mod. 81.

(b) 2 Hale's P. C. c. 13, p. 110.

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without any qualification. The case of *Rex v. Chandler*(a), though apparently opposed to this argument, will not bear out the contrary position, because there was no positive decision there upon this point. It is also said by Dr. Burn, "If a warrant is directed to two or more jointly, yet any one of them alone may execute it."(b) Lord Coke also lays down the same rule; and says, "If a sheriff, upon a *capias* directed to him, make a warrant, to four or three, jointly or severally, to arrest the defendant, two of them may arrest him, because it is for the execution of justice(c). This is a *dictum* directly in point, applied to a case of civil process, and supported by a powerful reason, namely, the execution of public justice. Upon all these authorities, therefore, as well as for the furtherance of justice, it seems clear, that wherever there is a general direction to all the constables of a county, any one of them may act in any part of the county, and as the constable here has acted strictly upon that principle, there is no ground for the present application, and this rule must be discharged.

Marryat, Gurney, and Bolland, contra, were stopped by the Court.

BAYLEY, J.—It is of great importance that accuracy should be observed in the direction of process of this nature, in order that the party who is to submit to it may know that it is executed by a person having authority for that purpose. Questions of the deepest interest may depend upon his knowledge of that fact, because, in case of resistance, where the death of the person serving the

(a) 1 Lord Raym. 546. Carth. 508.

(b) 1 Chetwynd's Burn.J.P.tit. Arrest, 174, citing Dalton, c. 169.

(c) Co. Litt. 181 a. Vide *Milsum v. Green*, 5 East, 233; and *Prestidge v. Woodman*, 2 Dow. & Ry. T. R. 43.

process ensues, that resistance may assume the different characters of murder, manslaughter, or justifiable homicide, according to the validity of the authority, and his knowledge of it. I agree, that where a warrant is directed to an individual by name, his jurisdiction is co-extensive with that of the Justices who signed it, and in such cases the party served need only be informed of the name of the party serving it. On the other hand, where it is directed generally to all the officers of a district by their name of office only, each one is limited to the jurisdiction of his own particular parish. The present is a middle case. The warrant here is directed specifically by the official character "to the constables of *Woolwich*," and the question is, to what extent of jurisdiction they are limited. I am of opinion, that both from the cases which have been decided upon this subject, and from the plain reason of the thing, each is limited to his own parish. The authority was given to *Ritchie*, as constable of *Woolwich*, not personally as *A. B.* nor generally as one of the constables of the county, and therefore I think he had no authority to act beyond the parish of *Woolwich*. This distinction is expressly taken in the case of *The Village of Chorley (a)*, where it is said, "if a warrant be directed to all constables, &c. generally, it shall be taken respectively, and no constable can execute the same out of his precinct." And this is founded in good sense and reason, for the name of a constable is a thing easy to be learnt, and likely to be known, but his character and office are not, at least beyond the limit of his own parish, and no man is bound to know that he fills the character when he goes out of his own parish. The same distinction is expressly taken by *Holt, C. J.* in *Rex v. Chandler*, when he says, "where a warrant is directed generally to

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(a) 1 Salk. 176.

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all constables, it shall be taken respectively to each of them within their several districts, and not to the constable of one parish to take a distress in another parish." In addition to these is *Tooley's case* (a), which bears very strongly and pointedly upon the present, for it goes the full length of determining, that where a warrant directed to the constable of one parish, is executed in another, resistance, and even the death of the constable, is justifiable; and that case was very similar to the present, for there the warrant was directed to the constable by his official character only, without any limitation in terms. Upon the whole, therefore, whether I consider the law as settled by the authority of the cases, or the just reason and propriety of the thing, I am of opinion that no constable is justified in executing out of his own parish a warrant directed to him by his name of office generally, and consequently that the prosecutor in this case has exceeded his authority, and the defendant's resistance was justifiable.

HOLROYD, J.—I am of the same opinion. I think the constable of *Woolwich* had no authority to act out of his district. I take the governing principle to be this: where the warrant is directed to a constable, describing him by his name of office only, it conveys no special delegation of power beyond his own precinct. In this case the warrant is directed to C. S. by name, as an officer, and then "to the constables of *Woolwich*." The effect of the latter direction is to give them power as constables merely, and consequently to limit their authority to the district in and for which they are constables. I think, as well upon the authorities, as upon reason and principle, the constable in this case had no jurisdiction

(a) 2 Lord Raym. 1300.

beyond the parish of *Woolwich*. The case of *Regina v. Tooley* seems to me to be quite decisive of the point, and governs the present. The *dicta* in *Hale* also appear to me to imply the same conclusion. They hold, that where a warrant is directed to a particular officer, by name, he *may* act out of his own immediate jurisdiction. So it is held also in *Rex v. Chandler*. But all these cases assume that the warrant is directed specially by name, and not by office only; and thus construed, I think they tend materially to confirm and strengthen *Regina v. Tooley*. Upon this view of the subject, and upon the authority of the cases mentioned by my learned Brother, I am of opinion that the service of this warrant was illegal, and therefore that this rule ought to be made absolute.

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BEST, J.—We are bound to take care that the office and duty of constables shall rest upon a clear, broad, and intelligible principle, so that the constables on the one hand may know what warrants they are to execute, and where to execute them, and on the other, that the parties upon whom they are to be executed, may know when and where they are bound to obey. Nice distinctions will be productive of great confusion, and will often produce that resistance which happened in *Regina v. Tooley*. The plain, clear, and broad principle upon which this case is to be governed, is this, namely, that the Magistrate may direct his warrant to any one by name, or direct it to a person by his official character. If it is directed to the party by name, he may execute it any where within the limits of the jurisdiction of the Magistrates; if it is directed by the name of office, it can only be executed in the district where the party is an officer. In the first case, the jurisdiction given to the constable is co-extensive with that of the signing Justices; in the second, it is limited

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to his own particular and personal district ; and this seems to me to be obvious to common sense. If I, being possessed of an authority extending over a certain limit, appoint another, *by name*, to exercise that authority for me, I evidently mean to make him my representative, and to give him a jurisdiction equal to my own ; but if I appoint him *by office*, I mean only to give him a jurisdiction limited to his own office, and inferior to my own. The cases alluded to by the Court, particularly *Regina v. Tooley*, and *Rex v. Chandler*, in my opinion, most clearly lay down this rule of construction, and I think we are bound to follow that rule in the present case.

Rule absolute for entering a verdict
for the defendant.

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COVENANT upon an indenture of apprenticeship.

The first count of the declaration stated, that on 11th April, 1820, by indenture made between the plaintiffs, *Thomas Winstone* the elder, and *Thomas Winstone* the younger, of the one part, and the defendant of the other, for the consideration of 90*l.* defendant covenanted with plaintiffs that he should, during the term of four years, from the date thereof, according to the best of his skill and knowledge, teach, or cause to be taught, the said *T. W.* the younger, in the trade of a tobacconist as then followed by defendant, and also should find and provide him with suitable and sufficient diet and lodging in his dwelling-house, in a like manner with the rest of his family, he the said *T. W.* at all times taking his meals with

Declaration upon an indenture of apprenticeship, whereby a master covenanted, in consideration of a premium of 90*l.*, to instruct the apprentice in the business of a tobacconist, for four years, and to board and lodge him during that time, alleged,
1. A general breach in the terms of the covenant;
2. A particular breach on

the 13th July, averring a refusal to instruct on that day or at any other time; and, 3. A similar breach as to boarding and lodging on the same day, and alleging, that on that day the master compelled the apprentice to quit the service, and refused to maintain and keep him, contrary to the effect of the covenant. Pleas, 1. Performance of the covenant until the 10th July. 2. Willingness to maintain and keep the apprentice during the whole term, but that from the date of the indenture until the 10th July the apprentice would not truly and faithfully serve defendant, nor attend to his business, but refused so to do, and setting forth various acts of misconduct on his part during the interval mentioned, and concluding, that, on the 10th July, the apprentice, against the orders of defendant, quitted the service, declaring that he would never return again, whereby defendant was hindered and prevented from performing his covenant. 3. Readiness to instruct and maintain according to the effect of the covenant, but averring neglect and refusal of apprentice to obey defendant's lawful commands on the 10th July, and a refusal any longer to serve him, and absconding on that day, whereby he was prevented from performing his covenant. 4. Averring a wrongful absence of the apprentice on the 10th July, whereby, &c.; and, 5. A denial that defendant had compelled the apprentice to quit his service. Replication took issue on the 1st and 5th pleas, and as to the other pleas there was a confession of the breaches of duty mentioned therein; but replying, that on the 13th July the apprentice returned to defendant, and tendered and offered himself to serve and obey him according to the indenture, but that defendant upon request refused to take him back, &c. Demurrer to the replication to the second, third, and fourth pleas, and joinder therein:—Held, that covenant would lie upon the indenture, notwithstanding the misconduct of the apprentice:—Held also, that there was no departure or discontinuance in the pleadings.

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defendant and his family, and not with his servants; and that by virtue of such indenture, *T. W.*, on the 12th *April*, in the year aforesaid, entered into defendant's service according to the tenor and effect of the indenture, and remained in such service until the time after mentioned. Averment of breaches, first, that although plaintiffs have always performed, &c. defendant did not, nor would, after the making thereof, to the best of his skill, teach, or cause to be taught, said *T. W.* the said trade, but wholly refused so to do. Second, that after, &c. to wit, on the 13th *July*, in the year aforesaid, defendant wholly refused then or at any other time to instruct, or cause to be instructed, said *T. W.* in the said trade. Third, that defendant did not, nor would, after, &c. find and provide *T. W.* with suitable and sufficient diet and lodging in his dwelling-house, &c. but, on the contrary thereof, on the said 13th *July*, forced said *T. W.* to leave his service, before the expiration of the time agreed upon for his remaining therein according to the tenor, &c. and refused to maintain and keep him, contrary to the tenor, &c. to the damage, &c. Pleas, 1. That as to so much of the supposed breaches of covenant mentioned, as relate to not teaching said *T. W.*, and not finding and providing him with diet and lodging before the 10th *July*, in the year aforesaid, defendant says, that from and after, &c. until the said 10th *July*, he did, to the best of his skill and knowledge, teach, or cause to be taught, said *T. W.*, in the said trade, and did also find and provide him with suitable and sufficient diet and lodging in the dwelling-house of defendant, according to the tenor, &c. concluding to the country. 2. That as to so much of the said supposed breaches as relate to not teaching said *T. W.*, and not finding and providing him with diet and lodging upon and after the 10th *July*, defendant says, he was ready and willing to teach him the said business,

and find and provide him with diet and lodging according to the indenture, during the whole of the said term, but he did not, nor would, well and truly serve defendant as an apprentice in his said trade, or diligently attend to the concerns thereof, but afterwards, to wit, on the 12th *April*, in the year aforesaid, and on divers other days and times, between that day and the 10th *July*, wholly refused so to do; and on one of those days and times said *T. W.* did wilful damage to defendant, by damaging a cart of his of a large value, then used by him in his business; and said *T. W.*, on several of the days and times aforesaid, refused to obey, and advised other servants of defendant in his business to disobey his lawful orders, and also refused to attend to the lawful remonstrances of defendant, made on occasion of his misconduct, and treated him, defendant, with insult and contempt, and refused to render him proper accounts of his monies from time to time entrusted to him as such apprentice; and that defendant, on the said 10th *July*, ordered him to cast up the day books used in his business, and it was the duty of the said *T. W.*, as such apprentice, so to have done; but he insolently refused so to do, and, on the contrary thereof, against the positive orders of defendant, absented himself from his service, declaring, that he never intended to return, whereby defendant was hindered from teaching, and from finding and providing him with diet and lodging according to the indenture, as he would otherwise have done, to wit, &c.; concluding with a verification. 3d. That defendant was always ready and willing to teach said *T. W.*, and also to find and provide him with suitable and sufficient diet and lodging, according to the tenor, &c. but said *T. W.* on the said 10th *July* refused to obey the lawful commands of defendant, or any longer to serve him as an apprentice, and of his own accord, without license, and against the will of defendant, absented him-

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self from the house and service of defendant, whereby defendant was hindered from performing his covenant, as he would otherwise have done, &c.; concluding with a verification. 4. That, on the 10th *July*, *T. W.*, without the leave, and against the will of defendant, wrongfully absented himself from his house, and from his service and employment as an apprentice, whereby defendant was hindered from performing his covenant; concluding with a verification. And 5. That as to the supposed breach of covenant relating to defendant's compelling said *T. W.* to leave his service, defendant did not compel him to leave his service in the manner alleged; with a conclusion to the country. Issue on the first and fifth pleas, and as to the second, third, and fourth, plaintiffs replied, that after said *T. W.* had been guilty of the supposed misconduct and breaches of duty, in those pleas mentioned, and during the said term, &c. and before the exhibiting plaintiffs' bill, to wit, on the said 13th *July*, said *T. W.* returned to defendant, and tendered himself to serve him as such apprentice, and was then and there ready and willing, and offered to serve defendant then, and during the residue of the said term, and then and there requested defendant to receive him as such apprentice, and to continue to teach him the said trade, and to find and provide him with suitable diet and lodging, in pursuance of the said indenture; but defendant then and there wholly refused, and from thence hitherto hath wholly refused to teach, or cause him to be taught, the said trade, &c. and also to find or provide him with suitable and sufficient diet and lodging, according to the said indenture; concluding with a verification. Demurrer to the replication, and joinder in demurrer.

E. Lawes, in support of the demurrer. The first and most important question arising on these pleadings is,

whether, under any circumstances of misconduct on the part of an apprentice, the master can put an end to the indentures. If the indentures of apprenticeship in this case import a mutuality of obligation between the master and the apprentice, it is quite clear that this action cannot be maintained. The contract, on the part of the apprentice, appears to have been broken, because the replication admits that the apprentice had been guilty of the misconduct imputed to him by the defendant, whereby the latter was prevented from performing his covenant. The condition here is mutual, and the contract as well as the consideration is entire. It has been decided, that a master is not obliged to take back an apprentice, or return any part of the premium, if he has been guilty of such misconduct as will have the effect of preventing the master from performing his contract. In *Cuff v. Brown*(a) it was held, that if an apprentice, after serving a part of his time, and without any misconduct on the master's part, runs away and enlists as a soldier, and afterwards is willing to return, but his master will not receive him, yet he is not bound to return any part of the apprentice fee; and there *Richards, C. B.*, said, "May he stay with his master for four years, and then run away when his services are become more valuable, and is the master to lose the benefit of that service? There is no contract to bind the master; for it was at the master's option to take him back or not. The master performs his contract till it was put an end to by the apprentice." This seems a decisive authority; for in the present case the defendant was ready to perform his contract, but it was put out of his power by the misconduct of the apprentice, whose act has in fact dissolved the contract. Unless it is held, that the contract in this case is entire, the consequences of a contrary decision would be most serious, because it would be competent for the apprentice to absent himself until

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(a) 5 Price, 297.

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the last day of the term, and then come to the master and insist upon his right to maintain an action for the breach of covenant in not teaching and maintaining him. It is a clear principle of law, that where the performance of the contract is prevented by one of the contracting parties, he cannot complain of its non-performance. This principle is recognized in an anonymous case(a), which was an action of covenant against an apprentice for leaving his master's service; and *Holt*, C. J. held, that if a master licensed his apprentice to leave him, he cannot afterwards recal that license. That case is the converse of this case; for here the apprentice has left the service of his master, expressing his intention not to return again, and upon the same principle he cannot maintain the present action, on account of the mutuality of the condition. In *Kennyston v. Preston*(b), Lord *Mansfield* laid it down, that if one party is ready, and offers to perform his part of the contract, and the other refuses or neglects to perform his, he who is ready, and offers, has fulfilled his engagement, and may maintain an action for the default of the other. It follows from this, that unless he has so fulfilled his engagement, he cannot maintain any action. In the present case, the defendant's performance of the covenant is prevented by the act of the apprentice. Another authority in support of the principle already mentioned is 1 *Rol. Abr.* 445, where it is held, that if *A.* be bound to *B.* and the condition is, that the son of *A.* shall serve *B.* for seven years, if *B.* take the son into his service, but afterwards during the term command him to go from him, the obligation is not forfeited. That is the converse of the present case. So, in the case of *Holcombe v. Hewson*(c), it was held that assumpsit will not lie against a publican for not taking his beer of a brewer, if the brewer do not continue to supply good beer. This case is distin-

(a) 6 Mod. 70.

(b) Doug. 691.

(c) 2 Campb. 391.

guishable from *Weaver v. Sessions*(a), in many particulars. There the contract was not entire or indivisible: there was a liberty given to buy malt of others, and the plea did not connect the malt purchased with the orders. The statutes concerning apprentices(b), have no bearing upon this case, and are indeed entirely out of the question; for if the Justices have jurisdiction over this matter, it is clear that the plaintiff never could sue the defendant for damages(c). *Gray v. Cookson*. There is no distinction in principle between a contract by parol, and a contract under seal, because if misconduct of an ordinary servant will dissolve the one, it will have the same effect in the case of master and apprentice. If this be so, there are several nisi prius cases in point. *Robinson v. Hindman*(d), *Spain v. Arnott*(e), *Williams v. Rice*(f). This is an action upon a common law contract for damages, and it must be construed by the rules applicable to other cases of the like nature. This then being an entire and indivisible contract, it is clear that the breach of it by the apprentice deprives him of his right of action. The defendant in this case does not at his own peril undertake, at all events, to teach the apprentice, because that must depend upon whether the apprentice will be taught or not. The apprentice having so misconducted himself as to put it out of the power of the master to perform his contract, the latter is discharged of all liability(g). Supposing these objections to the merits of the action be not available, there are objections to the pleadings in point

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(a) 6 Taunt. 154. S.C. 1 Marsh. 505.

(b) 5 Eliz. c. 4. and 20 Geo. 2. c. 19.

(c) 16 East, 13.

(d) 3 Esp. 235.

(e) 2 Stark. 256.

(f) 2 Geo. 4. Middlesex Sit-
tings.

(g) See *Heard v. Wadham*, 1 East, 619. *Duke of St. Albans v. Thore*, 1 H. Bl. 273. *Campbell v. Jones*, 6 T. R. 570. *Ritchie v. Atkinson*, 10 East, 295. *Ratcliff v. Pemberton*, 1 Esp. 35. *Jones v. Barclay*, 2 Doug. 694. *Anon.* 6 Mod. 76.

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of form, which will entitle the defendant to judgment on demurrer. First, the declaration assigns a general breach of covenant from the time of the execution of the indentures until the 13th of *July*. Upon this, issue is taken. But the replication admits that there was no breach previous to that day, therefore there is a discontinuance of the action, which will entitle the defendant to judgment. The discontinuance is as to the not teaching and maintaining from the 10th to the 13th of *July*. The declaration and issue on the first plea is as to the teaching and maintaining before the 10th of *July*. The rule is, that the plaintiff must follow up his entire demand throughout the whole of the suit; and if any part of it be discontinued in pleading, it is a discontinuance as to the whole (a), for there does not continue to be the same demand, which the plaintiff set forth in his declaration. *Gilbert's Common Pleas*, 158. Judgment must be given against the plaintiff if there be a discontinuance as to the subject-matter of the cause, or the parties, on demurrer to the replication, though the defendant's plea be bad. *Tippet v. May* (b). Then, secondly, the plaintiff's replication is a departure from his declaration. The declaration states a continuance in the service until the 13th of *July*, and the action is for forcing him to quit the service on that day, and the replication is for refusing to take him back when he returned. This is clearly a departure. The declaration states the plaintiff's continuance in the service until the 13th *July*, and his performance of the indenture; but the replication admits the contrary. This also is ground for general demurrer, as matter of substance. *Niblet v. Smith* (c). Then the plaintiff concludes with a general prayer of damages for the breaches of covenant

(a) See *Harris v. Mantle*, 3 T. R. 307.

(c) 4 T. R. 504. 2 Saund. 84 d. notis.

(b) 1 Bos. & Pul. 411.

pleaded to, whereas he should have new assigned. *Scott v. Dixon (a)*. These are objections available on general demurrer, and therefore the defendant is entitled judgment.

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Chitty, contra, was stopped by the Court.

BAYLEY, J.—I am of opinion that the plaintiffs are entitled to judgment. First, as to the technical objections to the pleadings, I think there is no ground for contending that this is a departure, because a departure is where the party rests his case in the replication upon a different ground from that in the declaration. The replication is to fortify and support the declaration, and not to depart from it. Here the declaration alleges that the defendant forced the apprentice to depart from his service. The defendant in his plea states, that the apprentice had disobeyed his orders. The replication is, that the apprentice was willing to go back into the service, but the defendant would not take him in again. That is forcing him to continue away afterwards. The substance of the declaration is, forcing him to absent himself; and the replication states the mode in which he was forced. There is therefore no ground for the first objection in point of form. I am of the same opinion with respect to the supposed discontinuance. A discontinuance may be where the plaintiff claims by his declaration more than he insists upon in his replication, as where he narrows his right, and claims less than what he sets out with in his declaration; but then it must be shewn most clearly, that in the replication the claim is narrowed, before that ground of argument can avail. Here the declaration complains that the defendant did not teach and feed, and did not suffer the apprentice to continue in his service. The allegation

(a) 2 Wils. 4. 1 Saund. 299 a. and 6 Mod. 70.

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is, "that after the making of the indenture, to wit, on the 13th *July*, defendant wholly refused to instruct and maintain him, and forced him to go away." That breach is not in its nature entire, and continuing during the whole period from the time when the indenture was made, until the period during which the indentures were to continue. It is divisible, and requires no period of time to be pointed out to sustain the breach. If the plaintiff can prove, during any period comprehended within the indentures, a refusal to instruct, a refusal to feed, or a forcing to depart, he is entitled to recover in this action; and the fallacy of the argument in this case is, in assuming that it is an entire claim for the whole period of time, the fact being, that it is a divisible claim as to any period of time. The replication does not discontinue, but supports the claim. In his declaration the plaintiff alleges a particular breach respecting part of the time, but in his replication he shews more pointedly what period of time he means. Upon the main question, I am of opinion, that the plaintiff is entitled to judgment. The question is, whether the acts of disobedience on the part of the apprentice set forth in the plea, entitle the master to cancel the indentures, or whether, if the apprentice offers to return to the service, he is not bound to receive him, it not being stated in any part of the pleadings that he had been absent for an unreasonable length of time. This is an action upon an indenture by which the father and the infant bind themselves that the latter shall serve the defendant for four years, and the master, on his part, covenants that he will, during that time, teach and maintain the infant. That is an absolute covenant on his part. Whether there are any other covenants on the part of the father and son does not appear upon this record. Covenants of this nature are not precedent and dependant, but mutual and independant. If

the apprentice refuses to perform his covenants, the master has a right to claim compensation against the father for any damage sustained thereby; so if the master does not do his duty, he is also liable to an action at the suit of the father. In answer to the breach of covenant now declared upon, the master relies upon three different pleas. The first is in substance, that the apprentice was guilty of disobedience, and had absented, and wholly withdrawn himself from the service of his master, accompanied with a declaration that he never intended to return. Now, if the apprentice had continued absent from the period of time in the plea mentioned, down to the end of the term, of course neither his father nor himself could have maintained any action. The second and third pleas do not carry the case in any respect farther than the first. The replication is, that after the son had been guilty of the acts of disobedience stated, the son had voluntarily returned, and tendered and offered himself to serve and obey the defendant during the residue of the term, but the defendant refused to receive him. I have had some doubt whether the replication ought not to have alleged that the offer to return was within a reasonable space of time, so as to throw upon the defendant the obligation of taking the apprentice back again, but no difficulty in that respect has been pressed in argument, and I am inclined to think, that if the defendant meant to contend that there had been an unreasonable interval between the period when the apprentice departed, and that when he offered to return, it should have been by way of rejoinder. Now, does disobedience of orders, or do any of the other acts mentioned in the pleas, entitle the master to put an end to the contract? I think not. These are the acts of an infant. No consent on his part to put an end to the contract will be valid for that purpose. His consent will not be sufficient. If the apprentice has been

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guilty of disobedience of orders, temporary absence without leave, or other acts of misconduct, these are matters for which provision might have been made by covenants entered into at the time the indenture was executed. There is no case which says that the master, for such conduct, shall be entitled to put an end to the contract. Agreeing that we are at liberty to construe this contract independently of the statutes concerning apprentices, still I think the existence of those statutes evidently shews, that without the provisions therein contained, the parties could not of their own act dissolve such a contract. Upon the whole, it appears to me that mere misconduct on the part of the apprentice, does not entitle the master at once to put an end to the indentures. One or two *nisi prius* cases have been pressed upon our consideration, but those refer to the ordinary relation of master and servant, which differs very materially from the case of master and apprentice. In general a premium is given with an apprentice to the master, in consideration of teaching and maintaining him during the term stipulated. But in the ordinary relation of master and servant there is a condition implied from the very nature of the contract, that if no definite period is fixed, it is to continue until there shall be a reasonable notice given, provided the party shall so long behave himself well. Such a condition is most reasonable, because the contract is to be a contract of service, and of service only, moving from the servant to the master. It would be most unjust to cast on the master the obligation of continuing under his roof, and paying wages to, a servant, who will not continue to perform that duty which the master has stipulated that he shall perform. That, however, is not the case of a mutual and independant contract, such as an indenture of apprenticeship; and for these reasons it appears to me that

these pleas are bad, and consequently that the plaintiff is entitled to judgment.

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HOLROYD, J.—I am of the same opinion. The objections taken to the technical forms of the pleadings in this case have been fully answered by my Brother *Bayley*, and I agree fully in the reasons he has offered why they are not tenable. As to the general question, it appears to me, that the cases which have been cited with reference to the contract between master and servant, are not applicable to the present case. In contracts of that nature the servant is to perform his service, in consideration of which the master is to maintain and pay him wages.—The performance of service in a due and proper manner is the consideration and the sole consideration for the master maintaining and paying him wages; and the moment he ceases to perform this obligation, the consideration fails. If he misconducts himself he may be discharged, and the master may refuse to pay him his wages if he does not earn them. The case of master and apprentice is different. That is not a case where certain duties are to be performed by the servant, for which a compensation is to be paid by the master. An indenture of apprenticeship is a contract for the instruction of a young person in a trade or business—a person who is to be protected against his own improvident acts, not being *sui juris*, and over whom the master has a higher control than over a servant. The case of master and apprentice therefore stands upon a very different footing; and at the same time it is to be observed, that when an apprentice is placed out, a premium is usually paid to the master for instruction. Here a premium of 90*l.* was paid with the apprentice. The master, on his part, enters into a covenant to instruct or cause him to be instructed. On the part of the master, that it is also a covenant for protection during the period of the apprenticeship; it gives

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him a right of control over the youth, in order that his instruction may be effectual. The argument urged on behalf of the defendant, if effect were given to it, would leave the apprentice wholly unprotected, and the moment he was bound, would leave him at liberty to do what he pleased, notwithstanding the indentures. I do not mean to say that the father might not be responsible for any breach of covenant to be performed by his son, but that the indenture is to be void for his misconduct, is a proposition which I think cannot be maintained. The misconduct of the apprentice in not obeying the lawful commands of the master cannot itself be considered as putting an end to the indentures, and unless it is to have that effect by releasing the master from his covenants, the present action is clearly maintainable. The statute of *Elizabeth* applies, I think, very strongly in argument upon the present occasion. I admit that this case is to be considered in the same way as if that act had not been passed; but it goes to shew, that notwithstanding any misconduct on the one side or on the other, covenants of this description are good in point of law; and if so, they are good for the purpose of maintaining this action. The provisions of that statute enable the master or the apprentice to complain before a Magistrate for misbehaviour, or any cause of complaint, on the one side or the other, and authority is given to the Magistrate to vacate the indenture if he thinks proper. That authority so vested in the Magistrate shews what the idea of the Legislature was in passing that statute, namely, that misconduct on the one side or on the other, stated generally, would not put an end to the indentures. I am therefore of opinion, that this action is maintainable.

BEST, J.—The objection taken on the ground of a departure has been fully answered by my Brother *Bayley*.

From the great gravity with which the argument upon the general question was put, and the zeal with which it was enforced, I was alarmed lest we should be compelled to pronounce one of the most unjust judgments ever given in a Court of Justice. What is this case? An indenture of apprenticeship has been entered into, upon the execution of which the master has received a premium of 90*l*. The apprentice goes under his master's protection. There is bad conduct on the part of the apprentice stated and not denied. That bad conduct terminates in the apprentice going away from his master's house on the 10th of *July*, and remaining absent two days; and on the 13th he returns again, and offers to continue in the service and conduct himself dutifully. It is argued that the apprentice having improperly conducted himself, and having gone away with the declaration that he would not return, he was from that moment put out of the protection of his master, and ceased to have any claim upon him for any portion of the 90*l*., or to have any right to call upon him for any further instruction. If that were law, it would be the most unjust law ever propounded in a Court of Justice; but that is not the case. If the apprentice misconducts himself, the master has a remedy against the father in an action of covenant upon the indenture, and may recover a compensation in damages for any injury he has received; but the misconduct of the apprentice is not to be considered a dissolution of the contract. I agree with my Brother *Holroyd*, that if the argument which has been urged in this case be right, there would be no occasion for the jurisdiction which the Legislature has vested in Magistrates and Chamberlains upon such subjects. I think the strongest argument is to be drawn from the jurisdiction thus given to Magistrates, that the misconduct of the apprentice is not of itself sufficient

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to dissolve such a contract, because all this care of the Legislature upon the subject would have been unnecessary, if by an act of imprudence on the part of the apprentice his indentures were to become void. What would be the consequence of sanctioning the argument which has been urged in this case? If an absence of three days would be sufficient to vacate the indentures, an absence of a single hour would be sufficient; and if a boy of fifteen years of age is guilty of a single act of misconduct, the master would have a right to turn him away; and although the parents should pay with him a fee of 500*l.*, the master would have a right to keep the whole. To hold such a doctrine as that would produce the grossest injustice. But it is said in this case that the absence of the boy prevented the master from teaching him. If the boy had been so long away that the master could not teach him, and an action were brought against the master, then he would have good reason for saying, "I would have taught your son, but he absented himself so long, and so misconducted himself, that it was impossible for me to do my duty." In such a case as that, the master would have a good defence to the action; but that is not the present case. Here the absence was no more than two or three days out of four years. The master was bound, unless he was released by the Magistrates, to take the apprentice back, and if he continued to misconduct himself, to endeavour to reclaim him, and to enforce upon him the necessity of acting more properly during the remainder of his time, in order that he might supply the want of that instruction which he had lost on account of previous disobedience to his orders. This is the case of a contract by deed, not put an end to by either of the parties, and that circumstance distinguishes the case from the authorities which have been cited, where the party

pleads in excuse non-performance of the duty required to be performed by the party who complains. Here the defendant has not been prevented from doing his duty, and therefore he is bound to take the apprentice back and perform his covenants.

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Judgment for the plaintiff.

The KING v. The Mayor, Aldermen, and Capital Burgesses of the BOROUGH of SUDBURY.

UPON an appeal against a poor rate for the hamlet of *Ballingdon*, in the county of *Essex*, it being objected by the defendants that they were rated for property which they did not occupy, the Sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

Richard de Clare, Earl of *Gloucester*, about the year 1250, granted certain pasture land called *Portman's Croft*, in the hamlet of *Ballingdon*, to “his burgesses and whole commonalty of *Sudbury*,” and *Charles* the Second, by his charter, under which the corporation exists, confirmed the said grant to the mayor, aldermen, and burgesses. This land is inclosed, and the corporation, which consists of a mayor, six aldermen, and twenty-four capital burgesses, appoint, and have always, within the time of living memory, appointed a person, who is called

Where a corporation, consisting of a mayor, aldermen, and twenty-four capital burgesses, was seised in fee of certain pasture lands, and appointed a ranger to keep the keys of the gates, cleanse the ditches, preserve the fences, impound cattle trespassing, &c.; and by a Court of Orders and Decrees regulations were annually made concerning the right of common to be exercised by the

freemen, as to the number of their cattle to be turned on, the time to be turned on, and the price to be paid for each head, which price was always paid by the freemen exercising the right, to the treasurer of the corporation, and which money, after deducting the expense of management, was distributed among the poorer burgesses, who had no cattle to depasture:—Held, that the corporation were liable to be rated to the poor as occupiers of the land in question, within the meaning of 43 Eliz. c. 2.

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"the ranger of the commons," to keep the keys of the gates, clean the ditches, preserve the fences, impound cattle trespassing, and do other acts of a similar description. They have, during all that time, at a Court called a Court of Orders and Decrees, annually made such regulations concerning the commons as they thought proper, and given a public notice of them by the common crier; and for the year when the rate in question was imposed, the order declared that every burgess who had a right to turn his cattle to feed on the common, should put on two head of cattle, and no more, on *Portman's Croft*. It then proceeded to appoint the day when the cattle should be turned on, and to fix the price for each head of cattle, which price is always paid by the freemen exercising this right (who amounted in the year in question to more than one hundred) to the treasurer of the corporation. The mayor, aldermen, and capital burgesses being resident, enjoy the same right upon the same terms, and some of them also exercised it during the year in which the rate was made. The cattle are branded, when turned on, by the ranger. The whole of the money thus paid to the treasurer, after deducting the expenses incident to the management of the land, is distributed among the poorer burgesses who have a right of depasturing cattle, but do not exercise it on account of their poverty. The mayor, aldermen, and capital burgesses, were rated in their corporate capacity as the occupiers of *Portman's Croft*. The questions for the opinion of the Court are, whether there was a rateable occupation of *Portman's Croft*; and if there was, whether the corporation, or the individuals who depastured their cattle upon it, were liable to be rated.

Walford (with whom was *Brodrick*), in support of the order of Sessions, contended, that the rate was well

made upon the present defendants, and that they were occupiers of *Portman's Croft* within the meaning of the word, as used in the stat 43 *Eliz. c. 2*. He relied upon *Rex v. Tewkesbury(a)*, as a case not distinguishable from the present, and consequently that the select body of the corporation of *Sudbury* were to be considered as trustees, for the benefit of the whole, and were therefore rateable in this instance.

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He was stopped by the Court; and

Knox was called upon to support the rule for quashing the order of Sessions. It is not contended that a corporation may not be rated, *Rex v. Gardner(b)*; nor will any question arise in this case upon the rateability of rights of common, *Rex v. Dersingham(c)*; the land upon which the rate is imposed being the soil and freehold of the corporation, though inclosed pasture. The point to be decided is, whether there was a beneficial occupation by the corporation as a body, or by particular individuals only, who were members of the corporation. In the first case, it is admitted, that the rate is properly imposed; but, in the second it cannot be supported. *The King v. Watson(d)* appears to have settled the question. There, certain lands belonging to the corporation of *Huntingdon* were depastured by such of the corporators as chose it, according to a stint annually fixed by the mayor, for which they paid a regulated price, which was divided among those members of the corporation who did not stock. The Court were unanimously of opinion that those individuals should be rated, and not the corporation, because the actual beneficial occupation was in them, for which they paid a pecuniary compensation.

(a) 13 East, 155.

(b) Cowp. 79.

(c) 7 T. R. 671.

(d) 5 T. R. 480.

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The King v. Tewkesbury (a) has been pressed strongly on the other side, but the facts are different; and the case of *Rex v. Watson* is not only recognized in it, but the decision is distinctly sustained. In the *Tewkesbury* case, the trustees were nothing more than agisters of cattle; they took in the cattle of strangers at a certain sum *per head*, which is a very common mode of occupying pasture land. They were, therefore, properly rated, and not the owners of the cattle. But here the corporation of *Sudbury* can, in no sense, be said to be agisters; a portion of its members occupy their own land, paying, as in the *Huntingdon* case, a consideration to those who do not stock. The appointment of the ranger by the corporation cannot affect the occupation; the services performed by him yield no benefit to the corporation as a body; that arises from the land, though the individuals who stock it derive advantage in the increase and preservation of the herbage from his superintendence of the pastures. It is very common to permit officers of corporations to occupy portions of the corporation property for corporation purposes; but it has been always holden, that such officers have been rateable to the full amount of their actual beneficial occupation, and not the corporations, and these decisions have never been questioned. The doctrine of an implied occupation has hitherto never been admitted. The argument, *ab inconvenienti* (from the large number of occupiers) was urged in *Rex v. Watson*; for there were eighty persons entitled to stock. It would certainly be more desirable, in many instances, to rate the landlord; but the statute makes such only liable, as are also occupiers. The number of occupiers, therefore, however large, cannot change the liability. It is in respect of occupation only that a landlord can be rated. But it is said the test

(a) 13 East, 155.

of occupation is the right of maintaining trespass. This point was adverted to in *Rex v. Watson*, and an opinion expressed by *Lawrence, J.* that the corporation could not bring that action, but that the individuals might, who were in the actual and exclusive enjoyment of the pasture under the stint. For these reasons the order of Sessions must be quashed.

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BAYLEY, J.—The case of *Rex v. Watson* differs from the present in two particulars, first, it was considered in that case, that the individual who turned on, had the exclusive occupation and enjoyment, independently of any right whatever in the corporation; and, in the second, nothing was paid to the corporation by those who stocked, they made a payment, but not to the body at large, it was merely to those burgesses who had a right to stock, but did not exercise it. In these particulars, therefore, this case is distinguishable from *Rex v. Watson*. I think it extremely probable, from my own local knowledge on the subject, that by the words *meted out*, used in that case, was meant that each party had originally a certain portion of the common specifically assigned for his exclusive enjoyment; but I do not rely upon that circumstance, because I do not collect it from any thing stated in that case. The *Tewkesbury* case is in some respects distinguishable from this, inasmuch as here the cattle by which the common is fed, belonged to members of the corporation, but in the *Tewkesbury* case they belonged to strangers. The principle upon which the *Tewkesbury* case was decided was, that the trustees were properly rated, because they did not let out any definite portion of land, and did nothing more in substance than take in the cattle to agist. In this respect, I think that an authority for the present case, because here no definite portion of land is let to any individual. The cor-

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poration do nothing more than take the cattle in to agist, at so much *per* head, annually, and the money, when collected, is paid to their treasurer. But this case differs from *Rex v. Watson*, in two important particulars, first, beyond all question the corporation possess an exclusive right of ownership, to a certain degree, over the common in question; and, secondly, they are the hands to receive all the money paid for the cattle agisted. The case states also this important fact, that there is a ranger of the common. By whom is he appointed? By the corporation at large; and by whom is he paid? why, by the corporation at large, out of the fund received by the treasurer, and that fund is supplied by those who agist their cattle, which money becomes the fund of the corporation at large. What is the duty of the ranger? he is to keep the keys of the gates, clean the ditches, repair the fences, and impound cattle trespassing, which are acts usually done by the occupier of land. Would all the commoners have a right to say, "we insist upon having the keys of the gates; we are the only persons entitled to occupy the land?" If the occupation was theirs, and not that of the corporation at large, they would have a right to hold that language to him; they would have a right to say, "you are our servant, and we will see whether we shall retain you or not." It appears that the corporation had, for the year when the rate in question was imposed, made an order, that every burgess who had a right to turn his cattle to feed on the common, should put on two heads of cattle, and no more. Then the number of cattle to be turned on, would depend, not upon the will of the corporation, but on the choice of the different persons having a right of common. They would have a right to determine whether they would take a compensation in money, or turn their cattle on, and the amount of the compensation

would depend upon the number of cattle which would be agisted. No man could predicate, at the beginning of the year, what the portion of common would be, which each burgess would enjoy, because the burgesses have an option whether they choose to turn cattle on or not. For instance, the commoners for half a year, might be sixty, and for the remainder of the year, they might be eighty, so that the amount of the annual profit would be uncertain. For one part of the year the burgess would have a sixtieth part of the profits, and for the other half he would have only the eightieth part. His proportion, therefore, would be varying from time to time. Why are not the corporation to be treated as the occupiers? They have the money which is paid in respect of the agistment, and out of that money, they have the complete power of paying the rate which is payable in respect of the property. For these reasons it appears to me, that this case is distinguishable from *Rex v. Watson*, and that it falls much more within the principle of *Rex v. Tewkesbury*, which certainly affords a much more reasonable rule of construction than the first-mentioned case.

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HOLROYD, J.—I am of opinion that this case comes within the principle of *Rex v. Tewkesbury*, and is distinguishable from *Rex v. Watson*. Several circumstances are found which did not appear in *Rex v. Watson*; for in the latter case, there was no proof that the corporation had any control or power over the land, or had a right to do any acts as occupiers of the land; but, in the present case, the right of soil is in the corporation. They appoint a ranger for the management of the land. He is to do certain acts necessary to keep it in order; he is to keep the keys of the gates, to cleanse the ditches, preserve the fences, and impound cattle trespassing; he

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is appointed by the corporation for all these purposes; as well as to do other acts of a similar description, and regulations are annually made by the corporation, with respect to the mode of enjoyment of the right of common by the freemen. The right is of a limited description, inasmuch as those who have the right, are only to exercise it according to the extent of the commons. These regulations limit the number of stints, and appoint the time when the cattle are to be turned on, and fix the price for each; and the sums of money so received are distributed by the corporation among the poorer burgesses. All these acts are done by the corporation in virtue of their possession of the land. Although these rights of common are exercised by such persons as choose to stock, paying a certain sum of money, still they are only to stock according to the limit allowed by the corporation, who, upon receiving the money, employ it for the benefit of the poorer burgesses, who derive no benefit from the common. The right of action, therefore, as far as doing any act upon this common by a stranger, would be an action of trespass by the corporation, in whose possession the land, in my opinion, lawfully is. If the burgesses have any right of action against any persons who disturb or infringe their common right, it would be an action on the case by them, and not trespass. How does this principle stand with respect to the case of *Rex v. Watson*? There the burgesses were tenants in common of the property which had been rated. In that case no action of trespass would lie at the suit of the corporation, the possession being in point of law in the burgesses, to whom the land was meted out. There is a great difference between the case where the whole possession of the land is yielded up for the purpose of beneficial enjoyment, and that where a subordinate right is allowed to be exercised, as

in the present case, in which the right of common is the right of the burgesses. If in this case the money paid by the burgesses was to be considered as a payment of rent in the character of tenants, they would be the persons to be rated; but I do not think this is to be considered as a letting of the common by the corporate body. The money payment is not for rent, but a receipt of money for the agistment of the cattle, the corporation retaining the right of possession and the actual possession, subject to the rights of pasture allowed to be exercised as a common right by such of the burgesses as choose to send their cattle on, and subject to a payment of a certain price, afterwards to be distributed among the poorer burgesses. For these reasons I think the defendants were rateable.

BEST, J.—I think this case is very distinguishable from *Rex v. Watson*, for the reasons stated by my learned Brothers, and ranges itself within that of *Rex v. Tewkesbury*. The latter is much more consistent with reason and sound sense, and, if it became necessary, I should rather be disposed to overturn the former, and support the latter. This is a very plain case. If *A.* is the occupier of land for the benefit of *B.*, *C.*, and *D.*, who is to be rated? Undoubtedly *A.*, and not *B.*, *C.*, and *D.*, who have no connexion with the land. They receive by the hands of *A.* the benefit of the pasture, but they have no connexion with the land, nor are they in any way to be considered as the occupiers; consequently *A.* must be the person rated. The corporation here, are not only the owners of the land, which it is admitted they are, but they are the occupiers of it for the benefit of the different members of the corporation, namely, first, those who are possessed of cattle and turn on; and, second, those who are too poor to be possessed of

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cattle, but amongst whom the money received from the agisters is afterwards divided. That shews that the corporation are occupiers of the land. This is nothing like a tenancy in common. Tenants in common have an equal interest in the soil. Here there is not one of the freemen who has an interest in the soil. The sole interest in the soil is in the corporation, and that distinguishes the case from a tenancy in common. The case expressly finds that the corporation are owners of the soil. They appoint a person called a ranger to keep the gates, cleause the ditches, and prevent cattle from trespassing; so that the possession must be considered as in them, and not in the burgesses. The right to impound cattle trespassing, could not be exercised if they had not the complete possession. That circumstance, I think, is quite decisive. But the case does not stop there. The corporation have a Court of Orders and Decrees, at which they make regulations concerning the number of cattle to be turned on by the burgesses, and for this purpose public notice is given by the crier with a view to ascertain what number of persons intend to send cattle on. It must be decided by the corporation how many cattle the burgesses have a right to depasture, and that must depend upon the number of poor persons who have no cattle. All this shews that the right of occupation is entirely and exclusively in the corporation; for if they have not that right of occupation, how comes it that this sort of jurisdiction is exercised? When the cattle are turned on, they are precisely in the same situation as the cattle of any other person, agisted on any other land, and it is impossible to distinguish this case from the ordinary case, where the owner of pasture-land agists the cattle of other persons who choose to depasture their stock at so much *per head*. This, certainly, is a very important case as it respects this bo-

rough. It is not, however, a question of convenience or inconvenience, but a question of rateability. How is it possible to rate any other person but the corporation? It is impossible to ascertain the amount of interest which each person who agists his cattle, has in the land; besides which, it cannot beforehand be ascertained who will have an interest, it being matter of uncertainty what persons will depasture their cattle each year. If the corporation be not rated, the land must go unrated, for it is impossible to rate any other persons. For these reasons I am of opinion, that though the corporation do not actually occupy the land, yet, as it is in their possession, they must be considered as the occupiers, and therefore rateable.

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Order of Sessions affirmed.

THE FOLLOWING CASES WERE DECIDED

AT NISI PRIUS,
IN LONDON, WESTMINSTER, AND ON THE
HOME CIRCUIT.

WESTMINSTER ADJOURNED SITTINGS,
AFTER HILARY TERM, 1822.

Coram ABBOTT, C. J.

1822.

Tuesday,
Feb. 26.

CROWTHER *v.* HOPWOOD, and Others.

Whether a conviction for a conspiracy to commit a fraud, disqualifies the convict from giving evidence in a Court of Justice? Such a witness received, per *Abbott, C. J.* at Nisi Prius, doubtingly.

REPLEVIN for goods and chattels, seized by the defendants. Avowry, that the goods and chattels were taken under a commission of bankrupt, and issue on the act of bankruptcy.

To prove the act of bankruptcy upon which the defendants relied, a person who had been convicted with others of a conspiracy to commit a fraud by means of false news, was tendered as a witness.

Scarlett, (with whom were *Marryatt*, *Gurney*, and *Comyn*), objected that he was not admissible as the witness of truth, having been convicted of a crime which rendered him infamous, and therefore incapacitating him from giving evidence in a Court of Justice.

Copley, S. G., (with whom was *Gaselee*,) submitted that the witness tendered had not been convicted of an offence which fell within the denomination of *crimen falsi*, and therefore there was no blemish on his moral character so as to disqualify him from being examined on oath. He had been convicted only of a conspiracy to commit a fraud, which was clearly distinguishable from a conspiracy to effect an object in which the public administration of justice was concerned, where alone the party convicted was rendered incompetent, and to which length, only, the decisions had gone. In a recent case in the Court of Admiralty, (a) *Sir William Scott*, after much consideration of all the authorities upon this very point, determined that a conviction for a conspiracy to commit a fraud would not render the affidavit of the convict inadmissible. This he urged as a decisive authority.

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*Scarlett*, in reply, said, that the greatest reverence was due to that learned Judge's opinion, but it should be recollected that his was a decision in a court of civil law, where the rules of evidence, acted upon in courts of common law, might not be so strictly observed. No court of common law had yet laid it down that a person convicted of a conspiracy to effect an illegal object was a competent witness.

ABBOTT, C. J.—In a doubtful case, I believe the practice is to receive the witness. This is so doubtful that I think I ought to permit this person to be examined, but I shall reserve the point as one deserving grave consideration. I believe *Sir William Scott* came to the decision which he pronounced in the case of *La Ville de*

(a) *La Ville de Varsovie* and Others, 13th May, 1817.

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CROWTHER  
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*Parsovie*, after much deliberation; and if I mistake not he conferred with some of the Judges of the courts of common law before he pronounced his judgment.

The witness was accordingly admitted, and gave evidence, but his admissibility was not afterwards questioned.

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SURREY LENT ASSIZES, AT KINGSTON, 1822.

*Coram* GRAHAM, B.

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March.

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The KING v. GEORGE CUNDICK.

To sell the dead body of a capital convict, for dissection, where dissection is no part of the sentence, is a misdemeanor, indictable at common law.

Indictment,  
“that one

**T**HIS was an indictment at common law for a misdemeanor. The first count stated, “that on the 10th of *September*, in the second year of the reign, one *Edward Lee* was publicly executed, at the parish of *St. Mary, Newington*, in the county of *Surrey*, that on the day and year aforesaid, in the parish and county aforesaid, one *George Cundick*, of, &c. undertaker, was retained and

*E. L.* was publicly executed at, &c., and that one *G. C.* of, &c. undertaker, was retained and employed by *W. W.* the keeper of the gaol in and for the said county, to bury the body of the said person so executed, for certain reward to be therefore paid to the said *G. C.*, by and on behalf of the said county, and in pursuance of the said retainer and employment, the body of the said person so executed was then and there delivered to the said *G. C.* for the purpose of being so by him buried as aforesaid, and it then and there became the duty of the said *G. C.* to bury the same accordingly, but that the said *G. C.* being, &c. and having no regard to his said duty, nor to, &c. did not, nor would bury the said body, but on the contrary thereof, unlawfully, &c. and for the sake of wicked lucre and gain, did take and carry away the said body, and did sell and dispose of the same, for the purpose of being dissected, &c. to the great scandal, &c. :”—Held, that the indictment was well framed, though apparently drawn in the language of a declaration in assumpsit:—Held also, that to support the indictment, it was not necessary there should be direct evidence that the defendant had sold the body for lucre and gain, and for the purpose of being dissected.

employed by *William Walter*, the keeper of the gaol in and for the said county, to bury the body of the said person so executed, for certain reward to be therefore paid to the said G. C., by and on behalf of the said county, and in pursuance of the said retainer and employment, the body of the said person so executed as aforesaid, was then and there delivered to the said G. C. for the purpose of being so by him buried as aforesaid, and it then and there became the duty of the said G. C. to bury the same accordingly;—but that the said G. C. being an evil-disposed person, and of a most wicked and depraved disposition, and having no regard to his said duty, nor to religion, decency, morality, or the laws of this realm, did not, nor would bury the said body so delivered to him as aforesaid, but on the contrary thereof, on the 11th *September*, in the year aforesaid, at, &c. aforesaid, unlawfully and wickedly, and for the sake of wicked lucre and gain, did take and carry away the said body, and did sell and dispose of the same, for the purpose of being dissected, cut to pieces, mangled, and destroyed, to the great scandal and disgrace of religion, decency, and morality, in contempt of our said Lord the King and his laws, to the evil example of all other persons in like cases offending, and against the peace, &c.”

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The KING  
v.  
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There were three other counts, slightly varying the charge, but all stating that the defendant had *sold* the body *for lucre and gain*, and *for the purpose of being dissected*. Plea, Not Guilty, and issue thereon.

The evidence in support of the prosecution was in substance this:—That the keeper of the county gaol had authority to employ an undertaker to bury the body; that he did employ the defendant to bury it, and paid him the usual fee; that the body was given into the possession

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The King
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CUNDICK.

of the defendant's servants, and that he himself had acknowledged it had come to his house; that when the relatives of the deceased applied to see the body, the defendant told them it was already buried; that upon being sent for by the gaoler to explain his conduct, the defendant evaded going, or giving any explanation; that several days after the day when he declared the body had been buried, defendant clandestinely went through the ceremony of burying a coffin filled with rubbish; that he was seen in the night-time removing a heavy package from his own house into a hackney coach; and that the body was afterwards found at a surgeon's in progress of dissection, and identified as the body of *Edward Lee*.

On the part of the defendant, two objections were taken. First, that the indictment was throughout, and upon general principles, bad, as a perfect anomaly in the history of criminal pleading. With the exception of the few formal words at the commencement and conclusion, there was not an expression in it that at all resembled the language of an indictment. It was, to all appearance and effect, a declaration in *assumpsit*, instead of an indictment for a misdemeanor. But, second, if the indictment could be held good, it was manifestly unsupported by the evidence, in three several particulars, for it stated in all the counts, that the defendant *had sold* the body, that he had sold it *for lucre and gain*, and that he had sold it *for the purpose of being dissected*. Now there was no evidence in support of any one of these averments. The only evidence was, that the body was not buried, but that it was found at a surgeon's; and without the production of the surgeon, and his testimony that he had *bought* the body of the defendant, *for money and for the purpose of dissection*, the Jury could not be asked to infer or

presume three such important allegations *against* a defendant, and the indictment therefore entirely failed upon evidence brought forward.

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The learned Judge, however, over-ruled both objections, leaving it to the defendant's counsel to reserve them for another place, where they might have the opportunity of moving them in arrest of judgment, if the defendant should be convicted.

The Jury found the defendant Guilty.

Nolan and Comyn, for the prosecution.

Adolphus, Turton, and Ryland, for the defendant.

The objections were not renewed when the defendant was brought up for judgment(a).

(a) Vide 4 East, 465. Willes, 538 ; and 4 Went. 219.

ESSEX SUMMER ASSIZES, 1822.

Coram RICHARDS, C. B.

The KING v. BARKER.

July.

THIS was an indictment against the prisoner, *James Barker*, under the statute 39 Geo. 3. c. 85. for embezzling the sum of 3s. and 4d. of the monies of his masters.

A person employed as a journeyman in the trade of a miller, and in the habit of

receiving money on his master's account, comes within the Embezzlement Act, 39 Geo. 3. c. 85.

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v.
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In the course of the evidence for the prosecution, it appeared, that the prisoner was hired as a journeyman miller, and not in any respect as a *clerk* or *accountant*, or to collect monies; that he was, however, in the habit of selling small quantities of meal on his masters' account, and of receiving the money for them; that no written account was ever kept by himself or any other person of such sales and receipts, and that his habit and duty was to pay over on each successive day what money he had received on the day preceding. In the present instance, the sale of the meal and receipt of the money by the prisoner was proved, and that he had never paid it over to his masters.

Andrews, for the prisoner, objected, that upon this evidence the indictment could not be supported, because the prisoner could not be considered as the servant of the prosecutors, within the meaning intended to be given to that word by the statute. The preamble of the statute ran thus—"Whereas bankers, merchants and others, are, in the course of their dealings and transactions, frequently obliged to entrust their servants, clerks, and persons employed by them in the like capacity," &c. In the first place, the words "and others," clearly referred to persons engaged in a way of business similar to that of bankers or merchants, which the prosecutors here clearly were not; and secondly, the words "and persons employed by them in the like capacity," could mean only clerks, or persons employed in a capacity similar to that of a merchant's or banker's clerk, which the prisoner clearly was not; for the evidence expressly shewed that he was hired only as a journeyman miller. He submitted, therefore, that the prisoner must be acquitted.

RICHARDS, C. B.—There is nothing at all in the present objection. It is by no means a new one, and it

has been over-ruled again and again, and convictions have taken place in much slighter cases than the present. I have no doubt that the statute was intended to comprehend masters and servants of all possible kinds, whether originally connected in any particular character and capacity or not. I certainly would not strain this or any other law against a prisoner, but I should not be dealing out justice if I were to yield to this objection.

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The prisoner was found guilty, and received sentence of transportation.



KENT SUMMER ASSIZES, 1822.

Coram RICHARDS, C. B.



HORN v. SWINFORD.

IN this case, a witness having attended and given evidence in obedience to his subpoena, was taken into custody in Court, by a person who alleged that he had become bail for the witness, and that the latter had absconded, and he had not been able to find him, until, by accident, he found him in Court as a witness.

A witness attending to give evidence in a Court of Justice, who absconded from his bail, may be re-taken by the bail in Court, and he is not protected by his subpoena.

The witness admitted that he had absconded from his bail, but claimed protection from arrest by virtue of his subpoena, which had compelled his attendance, and had exposed him to the peril of being re-taken.

RICHARDS, C. B., said, that this case was an exception to the ordinary rule, by which witnesses in attend-

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ance on a court of justice are protected from arrest. Where a witness has absconded from his bail, he is entitled to no such protection. When a debtor is admitted to bail, he is always supposed to be in the custody of the bail; and if he absconds, the bail may, for their own indemnity, take him, wherever he may be found. There was no reason for extending the ordinary rule to a person who has absconded from his bail, merely because he was exposed to the peril of being re-taken when attending as a witness in a court of justice, in compliance with his subpoena. This, in fact, was not a fresh arrest; it was in principle no more than a gaoler re-taking a prisoner who had escaped from his custody, which required no fresh warrant or process.

The witness was therefore re-taken.

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*Coram* PARK, J.

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The KING v. ELIZABETH MASON.

Where a defendant had established a Saving Bank, consisting of

**I**NDICTMENT under the statute 52 Geo. 3. c. 63. for embezzlement. The indictment charged, that the defendant, each of whom paid a weekly subscription of 2s. 1d., the odd penny being paid to the defendant for the trouble of managing the affairs of the bank, the funds of which were to be disposed of once a week by lottery, consisting of 129 blanks and one prize amounting to 13l., which was to go to the holder of the fortunate ticket; and the defendant having absconded, after receiving from one of the subscribers deposits to the amount of 10l. 8s., without receiving any benefit therefrom: —Held, that the defendant was not indictable under the 52 Geo. 3. c. 63, for embezzling the money as an “agent,” or as a person having the possession of money “for safe custody;” and held that, as the defendant had never at any one time more than 2s. 1d. in her possession belonging to the prosecutrix, though she had received, in the aggregate, the whole sum of 10l. 8s., the indictment charging her with receiving that sum generally, could not be supported.

*Quare*, whether money can be considered as *personal effects*, within the meaning of the 52 Geo. 3. c. 63.

defendant had, on, &c. at, &c. received of the prosecutrix the sum of 10*l.* 8*s.* *as an agent, for safe custody*, and had embezzled the same, contrary to the statute.

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v.  
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The case proved in support of the prosecution was this:—The defendant was the proprietor of a weekly saving bank, in which there were 130 members; each member paid in, weekly, the sum of 2*s.* and 1*d.*, the penny being allowed to the defendant as a remuneration for her trouble. At the end of each week a lottery took place, in which there were 129 blanks and one prize: the holder of which prize received the sum of 13*l.* the total amount of each week's subscription. All parties then went on with their subscriptions, until 130 weeks had gone round, and each member had received the 13*l.* prize. The prosecutrix was one of the members, and had paid in subscriptions to the amount of 10*l.* 8*s.*, without ever obtaining the prize, when the defendant suddenly absconded, and the deposit had never been forthcoming.

For the defendants, four objections were taken. First, that the money deposited with the defendant could not be considered as “personal effects,” within the meaning of the Act of Parliament,” the word “money” not being to be found therein; second, that the defendant could not be considered as an “agent,” within the meaning of the Act of Parliament, no such establishment as the one managed by the defendant being in existence at the time of the passing of the law; third, that the money mentioned in the indictment was not in the keeping of the defendant “for safe custody,” within the meaning of the Act of Parliament; fourth, that the indictment averred, that the defendant had received the sum of 10*l.* 8*s.* of the prosecutrix, whereas, the evidence proved that she never had, at one time, received or had in her possession, more than 2*s.* and 1*d.* belonging to the prosecutrix.

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PARK, J. said, that he should not give any express opinion upon the first point (although he inclined to lean to the objection), which he thought involved an extremely nice question of law, and one deserving of grave deliberation; but the other three objections were, in his opinion, clearly fatal to this indictment. There did not seem to be any such *agency*, or *keeping for safe custody*, on the part of the defendant, as was contemplated by the statute; and with regard to the receipt of the money, the evidence was decidedly at variance with the averment upon that point.

The defendant was therefore acquitted.

*Walford*, for the prosecution.

*Abraham*, for the defendant.

The KING v. AUSTEN and Another

The statute 58 G. 3. c. 70. s. 4. authorizes the Court to order the county treasurer to pay to the prosecutor or witnesses who shall appear to have been active in the apprehension of any person, and who shall give evidence against any person accused of grand or petit larceny,

THESE prisoners having been convicted of horse-stealing,

*Bolland* applied to the Court, on behalf of a witness of the name of *Walter*, that he should be allowed certain expenses which he had incurred in tracing the prisoners, and endeavouring to bring them to justice. He produced an affidavit, stating that Mr. *Walter* had travelled upwards of 300 miles in pursuit of the prisoners, that he had at length succeeded in apprehending them, and that in the course of his pursuit he had expended 17*l.* which sum he now prayed to have repaid to him. The &c., the costs of prosecuting and appearing before the Grand Jury; and also to compensate them for their loss of time and trouble in such apprehension. Where a person had travelled 300 miles and incurred an expense of 17*l.* in tracing and endeavouring to bring two horse stealers to justice, and had succeeded in apprehending them:—Held, by *Park*, J. that under this statute he was not entitled to any compensation for the money so expended.

order for this sum, as well as for Mr. *Walter's* expenses in attending the assizes as a witness, had been made out in the usual form; but upon presenting it at the office of the County Treasurer, Mr. *Walter* was refused payment of the 17*l.*, the treasurer expressing his doubt whether he was authorized by the statute 58 Geo. 3. c. 70. to pay such expenses; and it therefore became necessary to apply to the Court for a decision upon the subject. The question turned upon the 4th section of the act, which declares “ That it shall and may be lawful for any Court, before whom any person shall be prosecuted or tried for any grand or petit larceny, or other felony, and every such Court is authorized and empowered, at the request of the prosecutor or any other person or persons who shall become bound, &c. to prosecute or give evidence, or who shall be subpoenaed to give evidence against any person or persons accused, &c. and who shall appear to prosecute and give evidence, *or who shall appear to the said Court to have been active in the apprehension of any person or persons accused, &c., to order the sheriff or treasurer, &c., to pay unto such prosecutor and witnesses and person or persons concerned in such apprehension respectively,*” &c., the costs of prosecuting and of appearing before the Grand Jury, “ and also compensate such prosecutor and witnesses and *person or persons concerned in such apprehension, for their loss of time and trouble in such apprehension and prosecution as aforesaid.*” He contended that Mr. *Walter* was fully within both the spirit and the words of the statute; for it was quite evident that he had been “ active in the apprehension of” the prisoners in this case, that he was “ a person concerned in such apprehension,” and that the sum he prayed to be allowed was a “ reasonable compensation for his loss of time and trouble in such apprehension.”

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R EX

c.

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PARK, J., said, he was extremely sorry that he did

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not feel himself empowered to make an order for the payment of the sum prayed for in this instance. Upon the best consideration which he could then give the subject, it appeared to him, that the intent of the statute went no further than the reimbursement of the expenses incurred by a witness in attending at the trial of a prisoner; and that it did not include expenses incurred previous to the prisoner's apprehension. In this view of the case, much as he regretted the state of the law upon the subject, he was compelled to refuse the application.

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 MIDDLESEX SITTINGS AFTER HILARY  
 TERM, 1823.

*Coram* ABBOTT, C. J.

Monday,  
 Feb. 24.

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 The KING v. BIGNOLD.

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 If the counsel for the defendant on an indictment for a misdemeanor, opens new facts in his address to the Jury, and afterwards declines calling witnesses to prove the facts so opened, the counsel for the prosecution is, notwithstanding, entitled to a general reply.

**I**NDICTMENT against the defendant for perjury, assigned upon an answer to a bill in *Chancery*.

After the case for the prosecution was closed, the defendant's counsel proceeded to address the Jury, and, in the course of his address, read some resolutions, and stated certain facts, which he conceived to be material to the defendant's case; but in the result he declined producing the resolutions in evidence, or calling witnesses to establish the facts which he had opened. Upon which

ABBOTT, C. J. held, that the counsel for the prosecution had a general right of reply upon the defence which had been opened, although the facts and circumstances stated had not been established in evidence. The due administration of justice required that such privilege should be allowed, because the statement of facts and circumstances, unsupported by evidence, could not but have an effect upon the minds of the Jury. He should

lay it down as a general rule, that where counsel for a defendant opens facts upon the merits of the case, and declines calling witnesses to prove those facts, the counsel for the prosecution shall be entitled to a general reply.

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The counsel for the prosecution replied accordingly (a).

Verdict, Guilty.

*Scarlett* and *Adolphus* for the prosecution;  
*Copley*, S. G. and *Chitty*, for the defence.

(a) *Scarlett* observed, that he remembered a similar ruling in the time of Lord *Kenyon*, when the counsel for the defendant read an advertisement from a newspaper, and did not afterwards put it in evidence.

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### MIDDLESEX NISI PRIUS SITTINGS, 1823.

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The KING v. WHITEHEAD and BROWN.

Tuesday,  
Feb. 25.

**I**NDICTMENT against the defendants for a conspiracy to defraud Sir *Colin Campbell* of a sum of 600*l.*, advanced by him by way of annuity, secured upon certain property supposed to belong to the defendant *Brown*. It was admitted, on all hands, that the defendant *Brown*, who did not appear, was guilty of the acts of fraud, toward the accomplishment of which it was alleged that the other defendant had contributed. The defence set up by *Whitehead* was, that he was not privy to the alleged fraud, but that he had been himself deceived by representations made to him by the other defendant as to the state of his property. To support this defence it was proposed to give in evidence the written correspondence between the two defendants, touching the subject of the conspiracy prior to the time of the execution of the annuity deeds.

Where two defendants were indicted for a conspiracy to commit a fraud, and the defence of one was, that he himself had been deceived by the representations of his co-defendant, and part of a written correspondence between the defendants having been received in evidence for the Crown:—Held, that the whole of the correspondence between the defendants

up to the time of the overt act of the conspiracy was admissible in evidence for the defence.

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It was objected, on the part of the prosecution, that such evidence was inadmissible, upon the general rule, that one conspirator could not give evidence on behalf of another. If such evidence were received, nothing would be more easy than to manufacture a correspondence between the conspirators, for the purpose of producing it afterwards in defence. Nothing would be more dangerous than to establish a precedent of this description, which would enable conspirators to make evidence for the purpose of defeating the ends of justice.

In reply it was argued, that as other letters between the defendants had been produced on the part of the prosecution for the purpose of establishing the alleged conspiracy, it was competent to the defendant to produce the whole correspondence touching the transaction, which was the subject of the indictment. If the correspondence between the defendants was admissible to prove their guilt, it was equally admissible to establish their innocence.

ABBOTT, C. J., said, that under the peculiar circumstances of this case, which was certainly anomalous, he thought the whole of the correspondence between the defendants was admissible, on both sides, previously to the time of the execution of the annuity deeds, which was the consummation of the conspiracy. All letters subsequent to that time between the defendants he deemed to be inadmissible.

The correspondence was accordingly received in evidence.

The defendant was found guilty.

*Scarlett, Denman, C. S., and Curwood*, were for the prosecution; and *Copley, S. G., Gurney, and Adolphus*, for the defence.

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**The KING v. The JUSTICES of BUCKINGHAMSHIRE.***Thursday,  
April 17.*

**THIS** was a rule calling upon two Justices of the county of *Buckingham*, to shew cause why a mandamus should not issue, commanding them to grant a warrant of distress for enforcing payment from the Rev. *J. T. A. Reed*, rector of *Leckhampstead*, in the said county, of the sum of 18*l.* 18*s.* to the surveyor of the highways of the same parish, being the amount of his composition, in lieu of statute duty, as occupier of the tithes of the said parish.

Whether a rector who lets his tithes by parol to the occupiers of the lands, in respect of which the tithes arise, and receives a half-yearly composition in the nature of rent, can be treated as an occupier of tithes within the meaning of the General Highway Act, 13 Geo. 3. c. 78. s. 34, and rateable to the highways in the parish. In a case where Justices have reasonable ground for doubting their jurisdiction, the Court will not compel them to do an act which may subject them to an action.

On shewing cause against the rule, the facts disclosed upon the affidavits were these:—Mr. *Reed*, as rector of the parish of *Leckhampstead*, was seised of the parsonage-house, with the gardens, &c. and home close, containing about three acres belonging thereto, and seventy-seven acres of ancient glebe land, and also of the great and small tithes of all other lands in the parish, to the extent of 2400 acres and upwards. The parsonage-house, &c. and home close were in his own occupation, in respect of which he paid a composition, in lieu of statute duty, for the repair of the highways in the parish. The seventy-seven acres of glebe land he had let by parol from year to year to a tenant, who performed or compounded for statute duty in respect of his occupation as tenant. The tithes arising from the other lands in the parish had been let by parol to the farmers or occupiers of the lands, and had never been taken by Mr. *Reed* in kind, and the rents payable to him in respect of the tithes were reserved and received by him by equal half-yearly payments, the first of which became due at *Lady Day* in every year. The tithes were not bargained and sold by him to the farmers



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and occupiers when in a state of maturity, but were let to them prospectively, and without any reference to the specific mode of cultivation. During the period of his incumbency, he had not had any waggon, cart, chaise, or carriage of any description, nor any team, draught, or plough, nor had he ever hired or made use of any waggon, &c. nor had he in any manner used the highways within the parish, as occupier of tithes, nor otherwise than as occupier of the parsonage-house, &c. and home close, but he had occasionally hired a post-chaise for the use of his family. For thirty-two years previous to his incumbency, during which he was resident curate of the parish, the tithes had been let in like manner to the farmers and occupiers of the land, and during all that period neither the rector for the time being, nor any other person or persons than the said farmers or occupiers, had performed or compounded for, nor were called upon or required to perform or compound for the statute duty, for or in respect of the said tithes. At a Special Sessions, held in *October*, 1822, by an order of two Justices, the several sums of money therein mentioned were adjudged to be reasonable compositions to be paid by all persons liable to perform statute duty within the parish of *Leckhampstead*, and the usual notices were given by the surveyor of the highways to all persons inclined to compound for their statute duty, and they were required to signify their intention to compound for the same on a day mentioned, and at such time to pay their composition. A meeting of the parishioners took place in pursuance of the notices, at which *Mr. Reed* attended, when he was informed that the parishioners and inhabitants considered him liable, as occupier of the tithes, to perform statute duty, or to pay a composition in lieu thereof, but he declared his opinion that he was not liable, and expressed his determination not to perform statute duty, or pay any


composition. In 1821 a valuation hath been made of all the lands and tithes in the parish, in order to the better assessment and collection of the poor rates in which the tithes belonging to the rector were valued, at 354*l.* 13*s.* 10*d.* yearly, at which value Mr. *Reed* was rated and assessed to the relief of the poor as occupier of the tithes, and had paid the same accordingly. No appeal having been entered against the order of the Justices above mentioned, the surveyor of the highways demanded of Mr. *Reed*, as occupier of the tithes, the sum of 18*l.* 18*s.* as a composition, in lieu of his statute duty, according to the rates previously allowed by the Justices; but having refused to pay the same, he was summoned by the surveyor at a Special Sessions to pay the same. But the Justices were of opinion that Mr. *Reed*, having let or compounded for his tithes, the whole statute duty ought to be paid by the farmers as the occupiers of the tithes, and as Mr. *Reed* was not an occupier of tithes within the meaning of the General Highway Act, 13 *Geo.* 3. c. 78. s. 94, he was not liable to be rated; and consequently they refused to grant a warrant of distress for enforcing payment of the composition assessed upon him in lieu of statute duty. The question now was, whether, under these circumstances, Mr. *Reed*, having entered into a composition with his parishioners, and received a money payment in lieu of tithes, could be considered as an occupier of tithes within the meaning of the General Highway Act.

Dover shewed cause against the rule. The amount of composition in this case is not a matter of contest, nor is it contended that mandamus is not the proper remedy in a case of this description; neither will it be denied that an ecclesiastical person is liable to the highway rate as occupier of tithes; but it is insisted, under the circumstances

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disclosed in the affidavits, that Mr. *Reed* is not the occupier of tithes in the sense in which that word is used in the General Highway Act, 13 Geo. 3. c. 78. s. 34. The tithes, in this case, are clearly not *occupied* by Mr. *Reed*. The mode of compounding for the tithes which has been adopted, creates merely the relation of landlord and tenant. They are not bargained and sold at the time when they are in a state of maturity, but are let prospectively from year to year, and a money rent is payable half-yearly, and the tenancy so created can only be determined by a six months' notice. So long therefore as this tenancy subsists, he cannot be considered as the occupier, and consequently the person who has not the actual occupation is not liable to the highway rate. The affidavits state that Mr. *Reed* keeps no waggon, cart, or other carriage, nor is there any circumstance in the case which will bring him within the words of the Highway Act. At all events, considering this as a doubtful question, the Court will not compel Magistrates by mandamus to do that which may subject them to an action, if they should grant a distress warrant.

The Court stopped him, and called upon the other side to shew by what authority a mandamus could be granted to compel Magistrates, in a doubtful case, to do an act which might subject them to an action.

Marryat and *G. Marriott*, contra. The surveyor of the highways has no remedy, if the Justices shall not be compelled to grant their warrant to enforce the payment of the rate. The Highway Act provides, that the rate shall be levied by warrant of distress and sale. Now the Magistrates have been applied to for their warrant, and they have refused to grant it, assigning reasons for such refusal; but the Court will not enter into the grounds of

refusal, and there is no reason in point of law why the Magistrates should not be compelled to issue their warrant, there being no other mode of levying the rate. They cited, upon this point, *Rex v. The Justices of Middlesex* (a), *Stevens v. Evans* (b), and *Rex v. The Justices of Somersetshire* (c). Assuming that, in a doubtful case, the Court would not grant a mandamus, still this cannot be considered as a question of any difficulty. The rector must, for the purpose of rateability, be considered as the occupier of the tithes. There are several cases which decide, that a parson who compounds for his tithes is still to be considered as the occupier, and rateable to the relief of the poor. *Rex v. Lambeth* (d), *Regina v. Bartlett* (e). In this case Mr. Reed is rated to the relief of the poor in respect of these very tithes as occupier, and there seems no good reason why he should not be rated in like manner to the repair of the highways. The composition in lieu of tithes makes no difference as to the question of occupation, because the clergyman is beneficially interested in the land in respect of which the tithes arise. Neither does the mode of paying the composition make any difference, because it is perfectly immaterial whether he receives the composition in one or in two payments. According to all the determinations of this Court upon the subject of rateability to the poor, a clergyman who receives a composition in tithes, is still to be deemed as the occupier of the tithes, and upon this principle the clergyman in this case must

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(a) 1 Wils. 125.

(b) 2 Burr. 1152. S. C. 1 Sir W. Bla. 284.

(c) 2 Stra. 992.

(d) 1 Stra. 525.

(e) 16 Vin. Abr. tit. Poor, 427.

The case there stated was this:
A parson who lets his tithes to
the parishioners may be taxed

upon the poor-rate; for the lett-
ing is but an agreement with the
parishioners to retain the tithes;
and the parson here has a modus
for his tithes, though it was ob-
jected that the parishioners were
occupiers, and so the parson not
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be deemed the occupier, and consequently the person liable to pay the highway rate.

ABBOTT, C. J.—It is quite clear that we ought not to grant a mandamus in this case. If we should grant the writ, and the money should be levied under the warrant of distress, Mr. *Reed* might bring an action under the Justices, and try the validity of that act, which we had compelled them to do. Since I have had the honor of sitting in this Court, I have always expressed very great reluctance in compelling Magistrates to do any thing which might subject them to the chance of an action. In those cases where the duty of the Magistrates is clear and explicit, we interfere by mandamus, and suffer no idle suggestion, that an action may be brought to prevail with us; but where we cannot see that his duty is plain and obvious, but may be matter of doubt, we do not so interpose. Now, in this case, I must own there is considerable doubt upon the whole matter, whether, under the circumstances, this clergyman can be considered as the occupier of the tithes within the meaning of the General Highway Act. The question being doubtful, I think we ought not to compel the Magistrates to issue their warrant. I forbear saying any thing more, than that I entertain doubts upon the question. I do not wish to prejudge a question which may hereafter be considered, should any other Magistrates be found who shall issue their warrant, and thereby raise the point for discussion. When such question shall be raised, it will be the duty of the Court to hear it discussed, and decide upon it. At present I wish to be understood as giving no judicial opinion upon it, and that the ground on which I discharge this rule is, that I cannot myself clearly see that these Magistrates may not be subjected to an action, if they should issue their warrant.

BAYLEY, J.—In a doubtful case the Court never grant a mandamus to Justices. The public are very much indebted to the Magistracy of the country for the voluntary and gratuitous manner in which they discharge their public duties; and we ought not, in a case admitting of a fair degree of doubt, to subject them to the expense and hazard of an action, or require them to make a return to a writ of mandamus. Now, as far as I can judge, this case fairly admits of the doubt which the Magistrates have raised. It has been argued, that because Mr. *Reed* is rateable to the relief of the poor in respect of his tithes, under the statute 43 *Eliz.* c. 2, he is therefore liable to contribute to the highway rates. I think that by no means follows. The words of the General Highway Act, and the statute of *Elizabeth* are very different. Under the latter statute, tithes are not rateable *eo nomine*. The occupier of tithes, *qua* occupier, is not rateable, and the only words of the statute which give the power of reaching tithes, as a subject of rate, are “parson, vicar, tithes impropriate, and propriations of tithes;” but common rectorial or vicarial tithes are not mentioned. Why are they are not mentioned? Probably because the Legislature at that time meant to impose the burthen upon the parson and the vicar, and not upon other persons, who were the occupiers of tithes. In the case of *Rex v. Lambeth* the decision proceeded upon this footing, namely, that the vicar was liable to the poor rate in his character of vicar, and not because he was occupier. In the case of *Regina v. Bartlett*, the letting of tithes was not a letting from year to year, by way of retainer to the different parishioners, but a bargain or agreement *pro hac vice*, (as far I can judge, from the short statement of that case in *Viner’s Abridgment*,) and I cannot help thinking that there may be a difference between the case of a regular yearly letting, by way of retainer to the different

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occupiers of lands in the parish, and the case of an agreement with the parishioners to retain the tithes. Of this, I am sure, that the attempt now to raise this question for the first time, and to endeavour to throw this burthen upon the rector, will have a tendency to force clergymen into disputes with their parishioners, and to prevent them from entering into a composition, which is generally beneficial to the parishioner.

HOLROYD and BEST, J.'s, were absent.

Rule discharged, with costs.

Wednesday,
 April 23.

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 A conviction on the statute 5 Ann. c. 14. s. 4. for keeping and using a gun to kill and destroy game without being qualified, must be made within three lunar months after the offence is committed.

CONVICTION on the stat. 5 Ann. c. 14, for keeping and using a gun to kill and destroy game. The conviction (which was returned into this Court by certiorari) set forth, that on the 8th November, 2 Geo. 4., R. Roberts, D. D., in his proper person, came before C. E. J., Clerk, a Justice of Peace, &c. and gave him to understand, "that one *William Bellamy*, of the parish of *Stoke Doyle*, in the county of *Northampton*, grazier, within three months now last past, to wit, on the 1st September, 2 Geo. 4., the said *William Bellamy* being a person not having then lands, &c. (negating the several qualifications for killing game mentioned in the statute) did keep and use a gun, being an engine to kill and destroy game, against the form of the statute." The conviction then set forth a summons of the defendant on the 8th November, and his appearance on the 6th December, when he did not deny the fact of his keeping and using a gun, but

pleaded a qualification to kill game, whereupon the Justice proceeded to examine a witness on the part of the informer, who proved the offence, in the manner therein stated, to have been committed on the 1st September, 2 Geo. 4., and in conclusion, the Justice, after stating that the defendant had not shewn any sufficient cause why he should not be convicted, adjudged him to pay the penalty of 5*l.* in the usual form. The objection to the conviction was, that it had not taken place within three months next after the time of committing the offence, conformably to the statute 5 *Ann.* c. 14.

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Adams, in support of the conviction. This conviction being founded on the sec. 4. of 5 *Ann.* c. 14, is in time, inasmuch as no time is mentioned in that section, within which the conviction shall take place. The 2d section of the statute imposes a penalty of 5*l.* upon any bigler, &c. for having in his possession, or buying or selling, or offering to sell, game, and directs that the penalty shall be levied by sale and distress of the offender's goods, and for want of distress, directs, that the offender shall, for the first offence, be committed to the House of Correction for three months; and for the second, for four months, "provided that such conviction be made within three months after such offence committed." It cannot be denied that a conviction under this section must take place within three months. The question is, whether the same limitation is to be applied to the conviction for offences committed within the 4th section. By that clause it is enacted, "that if any person, not qualified by law, shall keep any sporting dogs or engines to destroy game, and shall be convicted by the Justices where the offence is committed *as aforesaid*, the person so convicted, shall forfeit the sum of 5*l.* the same to be levied by distress and sale of the offender's goods, by warrant under the hand

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and seal of the Justice before whom such person shall be convicted *as aforesaid*. If the words "as aforesaid," thus used in the 4th section, are to be construed as having reference to the manner and time of conviction mentioned in the 2d section, certainly this conviction is out of time. But such a construction seems not to be warranted, because the words "as aforesaid," do not necessarily refer to the time of conviction mentioned in the preceding section, and may as well be construed to refer to any other matter or thing mentioned in the same clause. The 4th section, taken by itself, expresses no limitation of time within which the conviction shall take place, nor indeed does it contain any direct words of reference to the preceding clause, which is expressly directed against biglers, and cannot be extended by any construction to unqualified persons keeping sporting dogs or engines to destroy game. The case of *Rex v. Tolley(a)*, though seemingly an authority in favor of the objection in this case, cannot avail the present defendant, because that case was decided with reference to the 9 *Ann.* c. 25, which recites and makes perpetual the 5 *Ann.* c. 14, and expressly provides, that the forfeitures incurred by the later act shall be recovered by such means, and in such manner and form, *and within such time*, as are prescribed by the recited act respecting biglers. The defendant in that case was convicted upon the 5 *Ann.* c. 14, and being a game-keeper, rested his defence upon the 9 *Ann.* c. 25, but as there are express words of reference in the latter act to the time mentioned in the 2d section of the former, within which the conviction shall take place, the Court very properly decided that the conviction was out of time, not having taken place within the three months mentioned in that section. Here, however, the words of reference contained in the 4th section by no means refer to the 2d section. Logically they

(a) 3 East, 466.

refer to matters mentioned in the 4th section, namely, convicted “before one Justice,” “upon the view of the Justice,” or “upon the oath of one or more credible witness or witnesses;” and the Court cannot, by any forced construction, tie those words down to any particular provision in the preceding clause, which is expressly applicable to a distinct class of offences, still less to the provision as to the time within which the conviction shall take place. The interpretation derives additional weight by reference to the 9 *Ann.* c. 25, which imposes a penalty upon a game-keeper killing game, who is not duly certificated, because by the express words of reference in that statute to the provisions of the 5 *Ann.* c. 14, as to the mode of recovering the penalties, and the time within which the conviction shall take place, a game-keeper not duly certificated must be convicted within three months, but if he be not a game-keeper, the inference is, that under that statute, the conviction might take place at any time. If this defendant had been proceeded against under the 9 *Ann.* and not being a game-keeper, this conviction would be in time. That statute applies solely to persons who are game-keepers not duly certificated, and therefore as to all other persons there is no limitation of time within which the conviction shall take place. Referring, therefore, to the reasonable construction of both statutes, this conviction is not restrained by the limitation as to time, by s. 2. of 5 *Ann.* c. 14. nor by the 9 *Ann.* c. 25, and judgment must be given for the Crown.


Denman, C. S. *contra*, was stopped by the Court.

ABBOTT, C. J.—I am of opinion that the conviction before a Justice of the Peace of an unqualified person for using a gun for the destruction of game, must take place within three lunar months, next after the offence has

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been committed. The conviction now before us did not take place until a period of three months had elapsed, and therefore it must be quashed. It has been more than once observed by the Court, that the language of Acts of Parliament is not to be examined with a critical eye, but according to its plain and obvious meaning. If we can find expressions in a statute capable of an intelligible explanation, it is our duty to give effect to them, according to the obvious intention of the Legislature, and not according to a critical and literal interpretation. Looking to the language of the 2d section of 5 *Ann.* c. 14, explained as it is by the language of the 4th, I think it was the obvious intention of the Legislature, that the conviction, in all cases under that act, should take place within three months next after the offence was committed. The 2d section enacts, "that if any higler, &c. shall have in his possession, or shall buy, sell, or offer to sell, any hare, &c., and shall be thereof convicted, he shall forfeit for every hare, &c. the sum of five pounds, &c. *provided that such conviction be made within three months after such offence committed.*" The 3d section only provides for the encouragement of destroyers of game, to make discoveries against persons who buy or sell game; the 4th section enacts, "that if any person or persons, not qualified by the laws of this realm so to do, shall keep, or use, any greyhounds, &c., tunnells, or any other engines to kill and destroy game, and shall be thereof convicted, upon the oath of one or two credible witnesses, by the Justice or Justices of the Peace, where such offence is committed, *as aforesaid*, the person or persons so convicted shall forfeit the sum of five pounds." The words "*as aforesaid*," clearly must refer to the time within which the conviction is to take place, because the offence cannot be committed before the Justices of the Peace. We must, therefore, understand these words "if any person

shall keep, &c., and be therefore convicted *as aforesaid*," as having reference to the 2d section, which mentions the time within which the conviction is to take place, for nothing is said in the 4th as to the time of the conviction, except by reference to the 2d section. Then comes the 9 *Ann.* c. 25. s. 1, which relates to the power of appointing game-keepers, and enacts, "that no lord or lady of a manor shall appoint above one person to be a game-keeper, and that the name of such game-keeper shall be entered with the Clerk of the Peace; and in case any other game-keeper whose name shall not be so entered; who shall not be otherwise qualified by the laws to kill game, shall presume to kill any hare, &c.; or, if any game-keeper, or other person whatsoever, not being qualified, in his own right to kill game, shall sell, or expose to sale, any hare, &c. the offender shall incur such forfeitures as are inflicted by 5 *Ann.* c. 14, upon higlers, &c. for buying or selling game, such forfeitures to be recovered by such means, and in such manner and form, *and within such time*, and to such uses *as are prescribed by the said act*." Now, the time which is mentioned, in the 2d section of 5 *Ann.* c. 14, seems manifestly to shew that the Legislature considered the 4th section which imposes the penalty on unqualified persons killing game, as limiting the time of conviction, in like manner as it was limited in the previous section against carriers and higlers. Unless this construction is put upon the statute, there would be this anomaly, namely, that the higler ~~must~~ be convicted of selling within three months, but the unqualified person so offending against the 4th section, might be convicted at any time after the expiration of that period, unless he was a game-keeper not duly certificated according to the 9 *Ann.* c. 25. There would be a great inconvenience in putting such a construction upon the statute; but that inconvenience is avoided by holding that

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the 5 *Ann.* c. 13, prescribes the limitation of three months to all the offences on which penalties are imposed by that statute.

BAYLEY, J.—I am entirely of the same opinion. In the case of *Rex v. Tolley* (a), the question arose upon the same section as the question in this case arises, and I think that case was rightly decided, and is an authority in point, on the present occasion. The 2d section of the act declares, that if the party is convicted before a Justice of the Peace within three months after the offence is committed, he shall be liable to the five pounds penalty, prescribed by that clause, and if he shall not be able to pay it, by distress and sale of his goods, he shall be liable to be committed to the House of Correction for three months, and for every other offence for the space of four months. Then comes the 4th section, which enacts, that the offender under that section, who shall be convicted "*as aforesaid*," shall pay a penalty of five pounds, the same to be levied by distress and sale of the offender's goods, by warrant under the hand and seal of the Justice before whom he shall be convicted "*as aforesaid*," and for want of such distress he shall be sent to the House of Correction for three months, and for every other offence, four months. Now here the words "*as aforesaid*" are repeated twice, and they clearly can have no meaning unless they have reference to the time within which the conviction is to take place, as mentioned in the 2d section. The words "*if any person convicted as aforesaid*," cannot apply to the time when the offence is committed, but to the time when the party shall be convicted. In a subsequent part of the same clause "*as aforesaid*" occurs again, as connected with the word "*convicted*," and therefore, in grammatical construction,

(a) 3 East, 467.

that section must have reference to the time mentioned in the previous section. The words "convicted as aforesaid" must be understood to comprehend all the limitations and restrictions mentioned in the 2d section, which, amongst other things, provides that the conviction shall take place within three months. This conviction has not taken place within that period, and consequently it must be quashed.

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HOLROYD, J.—I also think that this conviction not having taken place within three months, cannot be supported. It appears to me, that the case of *Rex v. Tolley* was rightly decided; but, I do not think that case is conclusive of the present. In the present case, unless the 4th section of 5 Ann. c. 14, has reference to the 2d section, by force of the words "convicted as aforesaid," it can have no application at all, but I think, in fair grammatical construction, the time mentioned in the 2d, within which the conviction is to take place, must govern the construction of the 4th section.

BEST, J.—I am of the same opinion. It is most important for a defendant that informations upon this statute should be prosecuted within three months, and that the conviction should take place immediately after the offence is supposed to have been committed, for if the prosecution is brought forward at a later period, his attention may not be called to the precise time when the offence is charged to have been committed, so as to enable him to make that defence which he would be in a situation to make if there had been a more early prosecution. If I had not the sanction of a decided authority, and if even this were a matter of doubt, unless I were restricted by express words, I should have no difficulty in

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saying, that this conviction, in order to render it legal, should have taken place within three months. Looking to the words of the statute 5 *Ann.* I have no doubt whatever that the conviction must take place within three months. The words "as aforesaid" in the 4th section, have no intelligible meaning, unless they refer to the 2d section. If they have reference to that section, then they must mean the time "aforesaid," which is three months. According to the 9 *Ann.* which expressly refers to the 5 *Ann.* c. 14. s. 2, it would be impossible for us to come to the conclusion, that a game-keeper, not properly certificated, might be convicted within three months, but that any other person, not a game-keeper, might be convicted at any time. But all doubt in this case is removed by the decision of *Rex v. Tolley*, in which, though the defence was not the same, yet the decision of the Court was in favor of the defendant upon this very point. The 9 *Ann.* is an exposition of the 5 *Ann.* and the Court, in that case said, that that statute got rid of all doubt on the subject, and shewed that the conviction must be within three months after the offence committed. That decision I think is perfectly consistent with the intention of the Legislature, and is an authority to justify us in giving judgment for this defendant.

Judgment for the defendant.

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for the purpose of laying down pipes and other necessary apparatus, for the conveyance of gas from the manufactory to the houses, &c. of the consumers." In pursuance of the provisions of this act, the company purchased the dwelling-houses, shops, buildings, lands, and premises, mentioned in the assessment, and erected and placed therein, retorts, gasometers, purifiers, and other apparatus necessary for the manufacture of gas and coke, (and part of which apparatus is affixed to the freehold, and part is not), and also by the consent of the aforesaid Commissioners, broke up the soil and pavement in the streets, and fixed therein the trunks, pipes, and other apparatus for the conveyance of gas, mentioned in the said assessment, and which communicate with the house and manufactory. The company carry on a considerable manufacture of coke and gas upon the premises so purchased, and derive a profit from the sale of each of those articles. The coke is conveyed from the premises of the company, to those of the purchasers, by means of carts and waggon, and the gas, by means of the trunks, pipes, and other apparatus for the conveyance of gas, mentioned in the assessment. Gas and coke are both manufactured from coal at a great expense of fuel, and the machinery and apparatus necessary for the manufacture of these articles, are also very expensive, and require frequent renewal. Stock in trade, and the profits of the manufactories in the parish of *Birmingham*, are not rated to the poor in this rate. The premises, trunks, pipes, &c. mentioned in the assessment as belonging to the company, if rated to the poor, as other lands within the parish, that is to say, if the profits arising from the sale of gas are not included, are worth 200*l. per annum*, but are worth 800*l.* if the profits arising from the sale of gas are included, if the Court should be of opinion that the profits accruing to the company from the sale of gas, are

not rateable, or that they can only be rated as the profits of a manufactory, the rate ought to be amended by inserting the sum of 200*l.* therein, in lieu of the sum of 800*l.*, and the sum of 5*l.* in lieu of the sum of 20*l.*

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N. G. Clarke, Gurney, Reader, and Holbech, in support of the order of Sessions. The *Birmingham Gas Light Company* are rateable in respect, not merely of the dwelling-houses, shops, buildings, land, and premises, and the trunks, pipes, and other apparatus fixed in the ground, but also in respect of the profits arising from the sale of gas within the parish. This rateability attaches upon them by virtue of the statute of 43 *Eliz. c. 2*, as occupiers of lands. According to all the authorities, this is an occupation of land, and the profits arising from such occupation, are the subject of rate. When once an occupation of land is established, the amount of rate is to be calculated by the profits arising from such occupation. The cases of *Rex v. The Corporation of Bath*(a), and *Rex v. The Rochdale Water Works Company*(b), seem not to be distinguishable in principle from the present case. In the first, the corporation of *Bath* were held rateable in respect of their profits arising from the conveyance of water through aqueducts and pipes laid under ground. Upon the same principle in the second, the *Rochdale Water Works Company* were held rateable in respect of their profits derived in like manner. In those cases the foundation of the rate was the beneficial occupation of the soil. So, in the present case, the soil being made use of to earn the profit, the profit is to be considered as an adjunct to the occupation, and therefore rateable upon the like principle. In this point of view, it is difficult to distinguish between water and

(a) 14 East, 609.

(b) 1 M. & S. 634.

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gas. The same mode of conveyance by an occupation of the soil is adopted, and consequently the same principle ought to prevail in both instances. Undoubtedly coal gas, *per se*, is not rateable, but when it is connected, as an adjunct, with any thing which is rateable, then it becomes liable. Upon this principle tolls, *per se*, are not rateable; but when they are connected with the soil in respect of which they arise, then the rate attaches, because they are identified with the soil, and produce a profit to the occupier. This is the principle upon which *Rex v. Macdonald* (a) was decided. In *Rex v. The Calder Navigation* (b), Holroyd, J. says, "a rate on land is in effect a rate on the profits of the land; for where there are no profits, there is no beneficial occupation." Here there is a beneficial occupation by the means stated in the case, and, upon the authority of these cases, this company are clearly rateable for such beneficial occupation. All that is necessary to shew is, that this company have a tangible local occupation in the soil, and when once that is established the profits arising from it, from whatever means, become rateable. The Court are to combine all the circumstances which tend to give the occupation an entire value, and are not to separate the mere value of the pipes and apparatus from the gas. Upon this principle it was determined, that the profits of a weighing machine (c), of a carding machine (d), and the canteen of barracks (e), were rateable. This case is not distinguishable from these authorities, and therefore the Sessions did right in affirming the present rate.

D. Pollock, Adams, and Finch, contra, were stopped by the Court.

(a) 12 East, 324.

(b) 1 B. & A. 269.

(c) *Rex v. St. Nicholas, Gloucester*, Cald. 262.(d) *Rex v. Hogg*, Cald. 266.

S. C. 1 T. R. 721.

(e) 4 M. & S. 317.

ABBOTT, C. J.—The question presented to our consideration is, not whether the *Birmingham Gas Light and Coke Company* are rateable for the buildings, land, and premises, and the trunks, pipes, and other apparatus occupied by them for the conveyance of gas, but whether they are rateable for the profits arising from the sale of gas. If it were meant to raise the first question, my opinion would be (speaking upon the subject judicially), that the company are only rateable for the amount at which the buildings and other premises mentioned in the assessment would let to any other persons for the purpose of carrying on a manufactory. But the form in which this case is presented to us does not raise that question. If we look to the mode in which this rate is estimated, and to the statement of the last paragraph of the case, this appears conclusive. It states, that “the premises,” which I understand to mean the buildings, “trunks, pipes, &c.” which may mean the ground in which the trunks and pipes are placed, mentioned in the assessment as belonging to the company, if rated to the poor as other lands within the parish, that is to say, if the profits arising from the sale of gas are not included, are worth 200*l.* *per annum*, but are worth 800*l.*, if the profits arising from the sale of gas are included. If the Court should be of opinion that the profits accruing to the company from the sale of gas are not rateable, or that they can only be rated as the profits of a manufactory, the rate ought to be amended, by inserting the sum of 200*l.* therein, in lieu of the sum of 800*l.*, and the sum of 5*l.* in lieu of the sum of 20*l.*” I am of opinion that the profits accruing to the company from the sale of gas are not rateable, and are not to be rated as the profits of a manufactory; for it appears from the statement of the case, that the profits of a manufactory are not rateable in the hands of any other persons. The distinction in the present case is, that the company are

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rated not merely for their premises, but in respect of the profit of a manufactory, which is something obtained by the skill and labour of man, and from money laid out in the purchase of materials, which are afterwards to be altered and brought into another shape and form. That circumstance renders this case perfectly distinguishable from all other cases; from the cases of canals, water-works, light-houses, locks, and other property of that description. For this reason it is, that the cases of *Rex v. The Corporation of Bath*, and *Rex v. The Rochdale Water Works Company*, are directly at variance with the present. In those, the rate was upon the water, which is a natural produce, but here it is upon gas, which is an artificial produce, obtained by the labour, skill, industry, and capital of the company. An inhabitant may be rated for the profits of his trade; but if this company is to be rated in respect of their gas, the rate would be imposed upon them on a very different principle. Here they are rated upon the sale of their gas, as occupiers of land, which I think cannot be supported. I am of opinion therefore that this rate must be amended, by inserting the sum of 200*l.* instead of 800*l.*

BAYLEY, J.—I am of the same opinion. This is entirely a question of *quantum*. In most of the cases which have formerly been before the Court, the only question was, whether there has been any rateable property or not, and in such cases reference was made to the profits as being the *criteria* by which the *quantum* of rate was to be ascertained. Such was the question with respect to canal locks. When the rate was imposed upon the lock, the profits were referred as to the mode of fixing the *quantum*; but whether the *quantum* of rate has been properly fixed, is a question into which the Court do not inquire, nor into which they feel themselves

at liberty to examine, unless it is specifically pointed out to their consideration. In the present case the *quantum* is specifically pointed out, and our attention is directed to a distinction between the value of the occupation of the land *per se*, and the profits resulting from carrying on, by means of the occupation, a beneficial manufactory. Now the criterion by which the value of this land, covered as it is by warehouses, buildings, and used, as it is, by a pipe-way, is the rent fair which ought to be paid for other land in the same parish. When the land is rated, it is rated according to the fair rent which it will fetch, and not according to the profit which particular persons might, under extraordinary circumstances, produce from it, by a particular mode of occupation. Its value is to be estimated according to a probable rent, if let to any other persons, and not according to temporary profits, arising from the sources which are unconnected with the land itself, and with reference to the value of which alone the rate ought to be imposed. Here the gas forms no part of the profits of the land; it is a manufactured article, produced by labour, and the investment of capital, and the profits upon which depend upon the price of coals, labour, and a variety of other circumstances. Looking at this, therefore, as a question of *quantum*, expressly submitted to our consideration, we are at liberty to decide the case upon that footing. If the case stated that these buildings, warehouses, and pipe-ways would have let for 800*l. per annum*, then we should have nothing to decide upon, but when we are informed that the rate is imposed partly upon the buildings, and other premises, and the remainder upon the profits arising from the sale of the gas, which is produced from the investment of capital, and a variety of other circumstances, we are bound to decide the case with reference to that distinction.—Referring to that distinction, I am of opinion that the

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larger rate cannot be supported, and therefore it must be amended by inserting 200*l.* instead of 800*l.*

HOLROYD, J.—This is not like the case of a canal, where there is a beneficial use of the land by means of the water. The land in such case is rated as so much land covered with water. Here, it is professed to rate the trunks and other apparatus, but it is in reality a rate upon the gas itself, which is not a natural produce, but is manufactured at the expense of human labour and capital. In this respect the case is distinguishable from those cases which have been cited. I think the profits arising from the sale of gas are not rateable, and that this rate must be confined to the buildings, pipes, trunks, and apparatus.

BEST, J.—I have no difficulty in saying that this rate cannot be supported in the manner, and under the circumstances in which it is made. It appears to me, that gas, as an artificial produce, cannot be made the subject of a rate, in respect of the occupation of land, and that it would be gross injustice to make this manufactory rateable on that principle. The question is not, whether these trunks, pipes, and other apparatus, are rateable property, but whether the profits arising from the manufacture of gas are rateable. The case expressly finds that stock in trade and the profits of the manufactories in the parish of *Birmingham* are not rated in any case to the relief of the poor. Now this is obviously a rate upon the profits of a manufactory, and therefore, upon the principle that other manufactories are not rateable, they ought not to be rated. Profits on a rent cannot be rated, nor are any uncertain profits rateable, on account of the difficulty of establishing an equal rate. The profit, in this instance, is produced at an enormous expense,

and at considerable hazard of capital, and has not a permanent annual value. Here there must be an union of capital and constant employed labour, in order to produce a profit. In this respect the case is distinguishable from a canal, where, when once the wharfs and locks are established, they remain permanently, and produce a permanent profit, but not so of a gas manufactory, where there must be an application of human labour, and a consumption of coal, day by day, in order to produce the article for sale. For these reasons I am of opinion, that this rate ought to be amended in the manner suggested.

Rate ordered to be amended, by striking out 800*l.*, and inserting 200*l.*, and by striking out 20*l.*, and inserting 5*l.*



**The KING v. The INHABITANTS of NORTH COLLINGHAM.**

*Wednesday,  
April 23.*

**BY** an order of two Justices, *Mary*, the widow of *William Barks*, with their three children, were removed from the parish of *North Collingham*, in the county of *Nottingham*, to the parish of *Fulbeck*, in the county of *Lincoln*. On appeal the Sessions quashed the order, subject to the opinion of the Court, on the following case :—

The pauper's husband, being legally settled in *Fulbeck*, came to reside at *North Collingham* in the year 1812, where he took and hired a house (being a separate and

Renting a house, and letting part of it off to a lodger, is holding a separate and distinct dwelling-house within the statute 59 Geo. 3. c. 50, so as to confer a settlement.

house and land taken at different times and of different persons, provided the whole annual rent amounts to 10*l.*, and the land and house be in the same parish.

A tenement within the meaning of that statute, may consist of



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distinct dwelling-house) with a garden, for a year, and from year to year, at the annual rent of 6*l.* 6*s.*; and he continued to hold and occupy such house and garden, and actually paid the aforesaid yearly rent for the same, from the year 1812 up to his death, which happened in *December*, 1821; but during the last four years of his holding the said house, he let to a lodger at 30*s.* a year, one of the rooms thereof, which room was on the ground floor, and communicated with a yard appurtenant to the house, by an outer door, and with the adjoining rooms of the house, by the inner door, of which doors the lodger kept the keys, as there was another outer door to the house. No alteration was ever made in the house or doors during any part of the period, for which *William Bark* was tenant thereof. The room was let unfurnished, and the lodger occupied nothing but the room, and *William Bark* was assessed and rated for the entire house to the poor, the highways, and king's taxes, and paid such assessments during the whole of his tenancy. In the year 1819 the pauper *bonâ fide* hired a piece of garden ground, in the parish of *North Collingham*, for the year, at the rent of 3*l.* 15*s.*, which ground he actually occupied for a year, and paid the said rent, and he continued in the occupation thereof up to the time of his death. The question for the opinion of the Court is, whether the pauper's husband gained a settlement under the stat. 50 *Geo.* 3. c. 50, which received the royal assent on the 2*d* *July*, 1819, it being admitted that the garden ground mentioned in the case was hired after the passing of that act.

Nolan and *Clinton*, in support of the order of Sessions, contended, that a settlement was gained by the pauper in *North Collingham*, and consequently that the order of Sessions, quashing the order of removal, must be affirmed. Two questions arise in this case upon the

construction of the 59 Geo. 3. c. 50.; first, whether a person who has taken a house, being an entire and distinct dwelling-house, can be prevented from gaining a settlement, by letting off a part of it to a lodger; and, second, whether the whole of the tenement, which is to confer a settlement, must, under this statute, be taken at one and the same time. As to the first point it is quite clear, that before the passing of this act, taking a tenement of the yearly value of 10*l.* would gain a settlement, though a part of it was underlet. *Rex v. Llandverras(a)*, and *Rex v. Newnham(b)*. There is no doubt, therefore, that letting part of the tenement to a lodger would make no difference before the 59 Geo. 3. The question then is, whether that act makes any difference in the old rule of settlement law upon this point. Now there is nothing in this statute which would render the circumstance of under-letting destructive of the settlement. All that the statute requires is, that there should be a *bonâ fide* hiring and occupation of the house during the whole year. It is by no means necessary that the occupation of every part of the house should be exclusive. It is only requisite that the pauper should continue the tenant, and reside for twelve months. The object of the Legislature in passing this act was, not to prevent the person who *lets* lodgings from gaining a settlement, but to prevent a mere *lodger* from gaining a settlement. In this very case the person who took the room might, by the old law, have gained a settlement, if he had paid four shillings a week, but it was to prevent the gaining of settlements by such means that the Legislature passed this act; to remedy the evil arising from constructive settlements, and to establish one plain and intelligible rule, namely, that no settlement should be gained by renting a tenement but

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(a) Burr. Sett. Cases, 571. S. C. (b) Id. 756.
Sir W. Bl. Rep. 603.

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by the person who really and *bonâ fide*, in the first instance, became the ostensible tenant of the house of 10*l.* *per annum*, and continued to reside during the whole year. Now every circumstance stated in this case, brings it distinctly within the statute. The Sessions have found that the husband of the pauper took and hired a house, being a separate and distinct dwelling-house, and continued to hold and occupy such house during a period of nine years. The terms of the act therefore have been literally fulfilled in every particular. The pauper continued an ostensible substantial tenant, and so far as the underletting goes, that circumstance is perfectly immaterial, it being sufficient that the pauper took the house and continued the responsible tenant during twelve months. Then, secondly, the question is, whether, in order to gain a settlement, there must be one entire taking from one person at one single rent, or whether a settlement may be gained by taking at two several hirings, a house of one person, and land of another. Now there is nothing in the statute which shews it to have been the intention of the Legislature to alter the mode and manner of taking the tenement, according to the old law of settlement. The statute does not require that the tenement shall be entire. It speaks merely of "tenement," in the singular number, and therefore the law remains as it was previously to the passing of the act. It is clear, from a variety of cases, that before this statute, lands and houses, taken at different times, might be coupled together, so as to form one tenement. The 13 & 14 *Car.* 2, and the 9 & 10 *Wm.* 3. c. 2, both use the word "tenement," in the singular number, and yet it has been held, over and over again, upon the construction of this word, as used in these statutes, that distinct tenements, when of sufficient conjunct value, whether situate in the same, or in different parishes, or taken at different times, and of dif-

ferent landlords, or held by distinct titles, are sufficient to confer a settlement. *North Nibley v. Wootton under Edge* (a), *Rex v. Sandwich* (b), and *Rex v. Newnham* (c). The Sessions, in the construction of this act, have followed these decisions, which fully warrant their determination.

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*Scarlett and Balguy*, contra. The 59 Geo. 3. is a remedial statute, and is to be construed most liberally in order to effect the object of the Legislature, which clearly was to put an end to constructive settlements by renting a tenement. This is manifest from the language of the preamble, which recites, "that whereas many disputes and controversies have arisen respecting the settling of poor people in parishes in *England*, by the renting of tenements," and then proceeds to enact "that no settlement shall be gained by renting a tenement, unless such tenement shall consist of a house or building, being a separate and distinct dwelling-house or building, *bonâ fide* hired, at and for the sum of 10*l.* a-year, at the least, for the term of one whole year, nor unless such house or building shall be held and occupied, and the rent for the same actually paid, for the term of one whole year, at the least, for the person hiring the same." To gain a settlement, therefore, it must be shewn, first, that the party had actually dwelt in, used, and exclusively occupied the house during the whole year; and, second, that he actually held a tenement at one entire rent, and one entire taking, of 10*l.* a-year. Now, neither of these requisites is established in the present case. In the first place, there is no actual dwelling, use, and occupation of an entire house, which is necessary according to the language of the statute. The house in question is not one entire tenement, for the pauper lets a part of it off to a

(a) *Foley* P. L. 79.(b) *Burr* S. C. 44.(c) *Id.* 176.

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lodger. He is therefore not the exclusive occupier of a house or building. It is quite clear, that when the under-letting took place, the pauper had no right to enter that part of the premises which he had so let off, and if he had thought proper so to do, he might be treated as a trespasser. The case expressly finds, that there were two outer doors to the house, one of which belonged to the room demised to the lodger, who kept the key of that door. In every sense of that word, this was a distinct tenement, and the holding and occupation by the pauper's husband were not entire. If, indeed, the key of the door of communication to the lodger's apartment, had been kept by the pauper's husband, this argument would fail, but the key being under the entire control and power of the sub-tenant, it is the same thing as if the apartment had been separated by a wall. Then, secondly, here is not one entire taking of a tenement of 10*l.* a-year, and on this ground the settlement cannot be supported. The house and the garden ground, although situate in the same parish, are held of different landlords, and cannot be coupled together, and considered as one tenement, within the meaning of the statute, which requires one entire hiring of a house or land, or of both, at one entire rent of 10*l.* at the least. These are separate tenements, neither of which is of the requisite value, and consequently no settlement is gained. It would be contravening the policy of this statute to hold, that the land might be coupled with the house, so as to constitute one entire tenement, and would again open the door to those constructive settlements, which it was the anxious object of the Legislature to prevent.

ABBOTT, C. J.—This question arises upon the construction of an Act of Parliament, which, I think, was certainly passed for the purpose of restraining constructive

settlements; but it is a general rule of construction, that Acts of Parliament, which are made upon the same subject-matter, are to have the same construction and effect, if they contain similar words and expressions to those used in the previous statutes. It is clear, that before the passing of this act, a tenement of 10*l.* a year, might consist of several different parcels, taken at different times, and at different rents. The first question is, whether, under this act, the tenement must be all taken at one and the same time, and at one and the same rent. The statute declares, that no settlement shall be gained by renting a tenement, “unless such tenement shall consist of a house or building, being a separate and distinct dwelling-house or building, *or of land, or of both, bonâ fide* hired by such person, at and for the sum of 10*l.* a-year at the least, for the term of one whole year, nor unless such house or building shall be *held*, and such land *occupied*, by the person hiring the same.” Thus far, this act restrains the former statutes as to value; but though there must be a hiring, still it does not say, that it must be one and the same hiring, nor does it say that the tenement shall be one distinct and separate matter. Therefore, I think, we are bound to construe this, like former acts relating to settlements, and to hold that the tenement may consist of house and land, taken at different times, and of different persons, provided the whole annual rent amounts to 10*l.* and is *bonâ fide* paid. Then the question is, whether there was a holding of the house, and an occupation of the land, by the pauper’s husband for one whole year.” The word “held,” used in the statute, is applied to the dwelling-house, and if that be construed fairly, it seems to me, from the finding of this case, that the pauper’s husband *held* the whole of this tenement. The difference of expression “held,” as applied to the house, may have been intended by the Legislature to meet the case of lodgers, properly so called,

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and to prevent the question arising, whether a person could be said to occupy a whole house, provided he let the whole or part of it in lodgings. The remaining point then is, whether this person held the whole of this house. It is contended that he did not, because the person, here called a lodger, occupied a part of the house, separate and distinct from the rest, so as to convey a doubt whether it was the dwelling-house of the pauper's husband. If that proposition had been established, no settlement would have been gained. But, looking to the facts of the case, I think the proposition is not sustained. The facts stated are, "that the person called a lodger, took a room on the ground-floor, communicating with a yard appurtenant to the house, by an outer door, and with the adjoining rooms of the house, by an inner door, of which doors the lodger kept the keys, as there was another outer door to the house." It is insisted, that by putting the key of the door of communication into the hands of the person called the lodger, it is the same as if a wall had been erected, so as completely to separate the apartment from the rest of the house. If the case had found that the key had been put into the hands of the lodger to prevent any communication between one part of the house and the other, there might have been more weight in the argument; but it is left uncertain whether the key was put into the hands of the lodger to enable him to enter by the outer or the inner door, and therefore there does not appear to have been a complete separation of the room from the rest of the house. That fact being left in a state of uncertainty, and it not being stated that the object of delivering the key was to prevent communication, we must rather infer that the object was to allow the lodger to go from one part of the house to the other, at his pleasure. It seems to me, therefore, that the occupation of this room is not made out to be separate and

distinct, but that the pauper's husband must be said to be the holder of the house, in like manner as if the lodger had not rented this particular room. That point being at least left doubtful, I think we are at liberty to consider the pauper's husband as the person holding the whole, though the lodger occupied one of the rooms. For these reasons I think the order of Sessions must be confirmed.

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BAYLEY, J.—I am of the same opinion. I think the second point is more a question of fact than of law. The Sessions might have decided whether the house was occupied as “a separate and distinct tenement, dwelling-house, or building.” At the time when the pauper's husband originally took the house, there is no question that it was “a separate and distinct dwelling-house or building,” and I do not see any thing to authorize us in saying that it ceased to be a separate dwelling-house when one of the apartments was let to a lodger, because the husband of the pauper still continued to be the *holder* of a distinct dwelling. I do not inquire into the other parts of the case with much minuteness, because I think we are bound to construe this act in the same way as other Acts of Parliament upon the same subject-matter, and to act upon the decisions which have been referred to in support of the order of Sessions.

HOLROYD, J.—I think we must construe the word “tenement,” as it has been construed in former Acts of Parliament, with reference to which this act is made. The act begins by reciting, that “whereas many disputes and controversies have arisen respecting the settling of poor people in parishes in *England*, by the renting of tenements.” The Legislature only meant to alter the law in those things which are made requisite by this Act of Parliament to be done to gain a settlement, but it leaves

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the law in other respects as it was before, as to what should be considered a tenement. We are bound to say, therefore, that the tenement may be made up of house and land, though taken separately, and at different rents. Upon the second point, it appears to me, according to the facts stated in the case, that although one room of the house was let off, yet the whole must be considered as one dwelling-house, held by the pauper's husband. He is clearly the responsible holder of the house; he pays the rates and taxes which are imposed on other houses, and he is, in the strict sense of the word, a householder.

BEST, J.—We are to construe this act according to the rules by which other statutes upon the same subject have been construed. The first point urged for our consideration is, whether this is to be treated as one dwelling. I am of opinion that we must consider it as one dwelling, in the occupation of the pauper. If it were not, no person in the city of *London*, who should let off a single room of his house, could gain a settlement, although he paid a rent of ten times 10*l.* a year. It is well known to be a common practice in this city, and many other places, for persons to take large houses, occupy only a small part themselves, and let off the remainder to lodgers, from whom they derive the means not only of paying the whole of their rent, but even of gaining a livelihood; and yet, according to the construction now contended for, these persons would not gain a settlement in the parish in which their houses were situated. That is a proposition, however, which cannot be maintained. But it is supposed that there was a separation of the room from the house, so as to negative the idea of an exclusive occupation. There is no separation which can have that effect. It is all one tenement, and it is impossible to say that it is not the dwelling-house of the pauper's hus-

band. The case finds, that there is an internal communication between the lodger's room and the rest of the house, and therefore it must be considered as part of the same house. The pauper's husband is the person whom the law considers as the tenant for all purposes of occupation and rateability. He is the holder of one entire tenement, and in addition thereto occupies land, the rent of which, added to that of the house, is sufficient to gain a settlement.

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Order confirmed.



The KING v. The TRENT and MERSEY CANAL
COMPANY.

Wednesday,
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THE defendants having been rated to the relief of the poor of the township of *Findern*, in the county of *Derby*, the Sessions on appeal confirmed the rate, subject to the opinion of this Court, on the following case:—

The appellants were incorporated by an act of 6 Geo. 3. by the name of “The Company of Proprietors of the Navigation from the *Trent* to the *Mersey*,” and empowered to purchase lands to them and their successors and assigns, for the purpose of making a navigable cut or canal from the River *Trent* to the River *Mersey*. And it is by that act enacted, “That it shall be lawful for the said company to demand and take for their own proper use and behoof, for tonnage and wharfage for all goods and commodities whatsoever, which shall be conveyed upon the said canal, such rates and duties as the said company shall think fit, not exceeding the sum of one penny halfpenny per mile for every ton of such goods and commodities which shall be conveyed upon the said canal,

A canal company are rateable to the relief of the poor, in each and every parish through which their canal passes, as occupiers of land covered with water.

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which said rates and duties shall be paid to such person or persons at such place or places near to the said cut or canal, in such manner and under such regulations as the said canal company shall direct or appoint." And it is further enacted, "That all persons whatever shall have free liberty to navigate the boats upon the said canal, under certain regulations, upon payment of such rates and duties as shall be demanded by the said company, not exceeding the rate thereinbefore mentioned." A part of the said canal being in length about one mile and fifty-two yards, comprising the quantity of land for which the defendants were rated, passes through the said township of *Findern*. The company have no lands, houses, warehouses, wharfs, or other property in the said township, except the canal and towing-path. No tolls, rates, or duties, are received in the said township, nor do any tolls, rates, or duties, become payable there, the company not having so directed or appointed, but the company receives annually a much larger sum than that, in respect of which they are assessed, for tolls for the passage over that part of their canal which lies in the township of *Findern*. The canal company derive very considerable annual profits from the canal. By an assessment made on the            day of *October*, 1818, for the relief of the poor of the said township of *Findern*, and duly published, the defendants were rated in the following manner:—

| Proprietors.       | Occupiers. | Names of Pieces.        | Quantity.     | Assessments. |
|--------------------|------------|-------------------------|---------------|--------------|
| Grand Trunk Canal. | Company.   | Canal and Towing paths. | 7 a. 369 dec. | 4s. 11½d.    |

Against this assessment the defendants appealed, upon the ground that they were not the occupiers of, nor have any rateable property in the township of *Findern*. The Court of Quarter Sessions confirmed the rate, subject to the opinion of this Court, upon the above case.

*Denman*, on a former day, in support of the order of Sessions, was stopped by the Court, and

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*Scarlet* and *Reader* being then asked whether they could distinguish this case from those cases which had decided this principle, namely, that a canal is rateable to the relief of the poor in each and every parish or township through which it passes, according to the value of the land covered with water; and, having expressed confidence that they should be able to distinguish this from those authorities, and shew that at least this canal was not rateable in the township of *Findern*, they were desired to look into the cases, and if, upon consideration, they thought they could point out any sound distinction, they might mention the case again. And now, on this day, they confessed their inability to distinguish this case, in principle, from *Rex v. Milton*(a). The company in the present case were certainly rated only as the occupiers of so many acres of land covered with water, and therefore they were not so much interested in resisting a rate founded upon that principle, but conceiving that this was only the commencement of a design to establish, first, that a canal company were rateable as occupiers of lands in the parish through which their canal passed, and then that they were rateable in the same parish in respect of their tolls also, though none were received there, they felt themselves called upon to oppose such an attempt. Understanding now, however, that the Court decided no more than that the company were rateable merely as occupiers of lands in the township of *Findern*; and that the Court did not recognize the principle to have been carried farther by *Rex v. Milton*, no further argument would be offered against the present rate. It was to be observed, however, as something remarkable, that

(a) 3 B. & A. 112.

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this was the first time since canals had been established in this country, that any attempt had been made to rate them as so much land covered with water.

**PER CURIAM.**—Is not that the only correct mode of rating them, according to the language of the statute of 43 *Eliz.* c. 2, which imposes the rate upon “every occupier of land?” Unless they are rated in this form, they cannot be rated at all. The cases which have been decided, establish this principle, namely, that the occupier of lands in every parish, is liable to be rated in respect of the land which he occupies in each, and if a canal passes through several parishes, the undertakers are rateable in each and every parish through which the canal passes, according to the quantity of land occupied. The *Trent and Mersey Canal Company* occupy the land which the water covers in the township of *Findern*, and are rateable in respect of such occupation.

Order of Sessions confirmed (a).

(a) See *Rex v. The Aire and Calder Navigation*, 2 T. R. 660. *Rex v. The Corporation of Bath*, 14 East, 609. *Rex v. The Calder and Hebble Navigation*, 1 B. & A. 263. *Rex v. Cardington*, Cowp. 581. *Rex v. The Grand Junction Canal*, 1 B. & A. 289. *Rex v. The Leeds and Liverpool Canal*, 5 East, 325. *Rex v. Macdonald*, 12 East, 324. *Rex v. The Mayor of London*, 4 T. R. 21. *Rex v. Milton*, 3 B. & A. 112. *Rex v. The New River Company*, 1 M. & S. 503. *Rex v. Nicholson*, 12 East, 330. *Rex v. Page*, 4 T. R. 543. *Rex v. The Rochdale Water Works Company*, 1 M. & S. 634. *Rex v. Sculcoates*, 12 East, 330; and *Rex v. The Staffordshire and Worcester Canal*, 8 T. R. 340.

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The EARL of BRISTOL *v.* WILSMORE, and PAGE the younger.

Thursday,  
April 24.

**C**ASE by the plaintiff, as chief steward of the liberty of *Bury St. Edmunds*, in the county of *Suffolk*, against the defendants, for the eloignement and rescue of sixty sheep from and out of the plaintiff's possession, which had been seized and levied under the warrant of the plaintiff, by virtue of the sheriff's mandate to him directed, upon a writ of *fieri facias*, issued at the suit of *Elizabeth Carver* against the goods and chattels of *William Miller*, at *Mayland*, within the liberty and jurisdiction of the plaintiff. Plea, Not Guilty, and issue thereon. At the trial before *Abbott, C. J.*, at the adjourned *Middlesex* Sitings, after *Trinity* Term 1822, the facts appeared to be these:—The writ in question was executed by the proper officers of the plaintiff upon the premises of *Miller*, on the 18th of *May*, 1821, who, amongst other property, took possession of sixty sheep, which were secured in one of *Miller's* pastures, where they remained in safety during that day and the next. In the course of the ensuing night the sheep, by some means, (alleged to have been by the contrivance and stratagem of the defendants) got into an adjoining corn field belonging to the defendant *Wilsmore*, by whom they were sent to the pound, and afterwards delivered to the defendant *Page*, a cattle jobber, who claimed them as his property, and refused to deliver them to the plaintiff upon demand. Both defendants knew that the sheep had been taken in execution. It appeared that the sheep had been sold to *Miller* by a servant of the defendant *Page* for account of the latter, on the day preceding the execution. *Page* had

If *A.*, under pretence of a purchase obtains possession of *B.'s* goods, with a pre-conceived design not to pay for them, and absconds, to avoid suit for the value, and the sheriff seizes such goods in execution immediately after the delivery to *A.*, it seems that *B.* may lawfully rescue them out of the hands of the sheriff even by stratagem, but the validity of the purchase by *A.* is a question for the Jury.

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directed his servant to sell them *for ready money only*, but they were in fact paid by a draft upon *Miller's* bankers at *Colchester*, in *Essex*, which was retained by *Page* till the 18th, when it was presented and dishonored. It was alleged, that in consequence of this, *Page* resorted to the contrivance above mentioned, in order to regain possession of the sheep, and with the assistance of *Wilsmore* effected his object in the manner suggested. Upon these facts an objection was taken on the part of the defendants, that in point of law no property in the sheep had passed to *Miller*, the supposed sale being founded in fraud, and consequently they had been wrongfully seized by the plaintiff, and might be lawfully re-taken wherever found. To this it was answered, that even if the objection were good, it was not competent to the defendants to raise it, they being at all events wrong-doers in re-taking the sheep by stratagem and collusion. The learned Judge however was of opinion, that the property in the sheep had passed to *Miller*, and that even if it had not, the defendants were not entitled to the benefit of the objection; and the Jury, under his direction, in point of law, found a verdict for the plaintiff for the full amount of the value of the sheep.

*Marryat*, in *Michuelmas* Term last, obtained a rule to shew cause why the verdict should not be set aside, and a new trial had, or why the judgment should not be arrested, upon the ground, first, that the learned Judge had erroneously decided as a question of law, that which should have been left to the Jury as a question of fact, namely, whether the sale to *Miller* was a *bonâ fide* sale or no; and, second, that he was mistaken in holding that that objection was not available on the part of the defendants.

*Scarlett* and *Chitty* now shewed cause against the rule. There are two objections raised in this case. First, that it should have been left to the Jury to say whether any property passed to *Miller* by the sale and delivery of the sheep to him by *Page*; and, second, that the learned Judge misdirected the Jury in telling them that it was not competent to the defendants, being themselves wrongdoers, to take advantage of any informality or fraud in the sale. With respect to the first point, it is not denied that the sheep had been in the possession of *Miller* for two days, when they were seized under the execution, and therefore their removal on the following night was fraudulent and illegal, as a removal out of the custody of the law. [*Bayley, J.* If they were the property of *Miller*, it was so; but had he any property in them?] That is immaterial as respects the wrongful removal; they were taken out of the sheriff's custody, and whether they were the property of *Miller* or not, the possession of the sheriff was the custody of the law, and no person had a right to retake them. [*Bayley, J.* That doctrine is not true to the extent claimed for it. Surely if the sheriff takes the goods of *A.* under a writ directed against *B.*, *A.* may legally retake them wherever he can find them.] Not if they are in custody of the law. Then the important question arises, had the property in the sheep passed to *Miller*? Now, that is a question of law, and not of fact for the Jury. The transaction was the simple and ordinary one of goods sold and delivered; there was a *bonâ fide* sale, and an actual and complete delivery; and that was by law sufficient to pass the property. [*Bayley, J.* Was it a *bonâ fide* sale? They are sold by a mere servant, who perhaps exceeded his authority: for his instructions were to sell for ready money only.] If this transaction, and the interval that had elapsed before the execution, did not pass the property to the vendee, what dealings,

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and what interval are sufficient for that purpose? Where is the line to drawn? The mode of payment could not affect the transaction; payment by a check is a ready money payment, and was accepted as such in this case. Suppose *Miller* had immediately resold the sheep to a third person, would they have been seizable in the hands of the third person? And if not, which cannot be contended, why should they be seizable in *Miller's* hands? A sale in market overt, it is not disputed, would have passed the property, and in what respect does this transaction differ from a sale in market overt? If this sale be not binding upon the property, the great majority of all sales might be rendered inoperative, for nineteen out of twenty are conducted precisely in the same manner as the present. [*Bayley, J.* A man authorizes his servant to sell property for him *for ready money only*, the servant sells for a check, which turns out to be worth nothing; does that act of the servant bind the master?] Certainly it does. The act of the servant is, in all such cases, the act of the master; the general authority to sell over-rides the stipulation as to the mode of payment, and makes the contract valid, whether the money is paid or not. But this case goes further, for here the master accepts the check as a payment, and keeps it an entire day, and that is a complete ratification, and acceptance of the contract itself. The principles which govern the law of stoppage *in transitu* apply by analogy to the present case. There the change of property is complete, and the right of stoppage is barred, so soon as a delivery has taken place; and so here, where the goods are delivered, the property in them is passed, and the right to annul the contract is gone. In this case, therefore, the sheep were the property of *Miller*; they were seized by the sheriff as such; they then became placed in the custody of the law, and from thence not even the owner himself, much less the

person who has divested himself of the ownership by a sale and delivery, can legally remove them. But, secondly, if this objection were tenable in itself, it is not competent to the defendants on this record to take advantage of it, because the alleged fraud is not such as would render *Miller* amenable in a criminal prosecution, supposing he had sold the sheep to a third person. Both these points, therefore, were properly decided by the learned Judge who tried the cause, and there is no ground for disturbing the verdict which the Jury have, under his direction, found.

*Marryat*, (with whom was *Walford*), in support of the rule. The contract was attended with fraud on the part of the purchaser, and by error on the part of *Page's* servant, who, through ignorance, exceeded the authority with which he had been vested. It is therefore no contract at all to bind the principle, or to pass the property, and it should at least have been left to the Jury to say whether it was such a sale as the owner of the sheep had authorized his servant to make. It has, however, been decided, that where the buyer practises a fraud upon the seller, no property passes from the one to the other, even by the delivery of the goods; *Noble v. Adams (a)*, and *Read v. Hutchinson (b)*; and therefore no property passed in this case; because the act of payment by a check, which *Miller* knew to be of no value, was a gross and decided fraud on his part, and violated the contract *in toto*. Then, secondly, this is a good objection on the part of the present defendants. It was suggested at the trial that it was not competent for the defendants to raise it, because if *Miller* had resold the goods, he would not have been indictable either for a larceny, or for a fraud; and the case of *Rex v. Lara (c)* was cited. But that ar-

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(a) 7 Taunt. 59.

(b) 3 Camp. 552.

(c) 6 T. R. 565.

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gument does not go the whole length required to support it. It may be indeed admitted, that he would not have been indictable for a larceny; and *Rex v. Lara* also decides, that he would not have been indictable for a fraud *at common law*, because no false token was used. But he clearly would have been indictable under the statute 30 Geo. 2. c. 24, for obtaining the goods *by false pretences*, for that statute makes no mention of a false token, the *pretence* is sufficient, and this was expressly decided in *Rex v. Jackson(a)*. The Court stopped him.

ABBOTT, C. J.—Upon further consideration, I think, and all my learned Brothers are of the same opinion, that if *Miller* obtained possession of these sheep with a pre-conceived design not to pay for them, and to abscond, in order to prevent his being sued for the value, he obtained them by such a fraud as would prevent the property passing legally, according to the cases of *Noble v. Adams*, and *Read v. Hutchinson*, which have been cited. It must be a question of fact for the consideration of the Jury, whether that was so or not, and I now think, in concurrence with my learned Brothers, that I ought to have left it to the Jury. As to the other point, what occurred to me at the trial was, that inasmuch as the defendant *Page* had repossessed himself of the sheep by a trick, it was not competent for him to say, that the property had not passed to *Miller*. My learned Brothers think, and I am disposed to concur with them, that I took an incorrect view of the subject, because, referring to the principle of this action, it could not be maintained by the sheriff, unless the goods seized by him were the property of the person against whom the execution issued. If these sheep were not the property of *Miller*, the plaintiff ought to have

(a) 3 Campb. 370.

been nonsuited. The proper mode therefore of deciding that question, is to grant a new trial.

Rule absolute.

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The KING v. The INHABITANTS of NORTHWOLD.

Saturday,
April 26.


BY an order of two Justices, *William Thorpe* was removed from the parish of *Feltwell* to the parish of *Northwold*, both in the county of *Norfolk*, as the place of his last legal settlement; and, on appeal, the Sessions confirmed the order, subject to the opinion of this Court, on the following case:—

The pauper was hired for a year from *Michaelmas* to *Michaelmas*; served his master accordingly in the parish of *Northwold*, and received his wages. The day before the end of the year, the master, being then about to remove to *Brandon*, asked the pauper if he would like to go with him thither? The pauper answered, that he had no objection. The master replied, that he feared that the pauper was scarcely strong enough for the work there, but he might try. The pauper then asked to go and see his friends, and returned to the master at *Northwold* the day after *Michaelmas-day*. He then drove his master's team to *Brandon*, and remained in his service there, without any other hiring, for the space of six weeks, when the master asked him what wages he expected. The pauper answered, "What you please." The master replied, that he would give him the same as the year before, to which the pauper assented, and continued in his ser-

At the end of a year's service in the parish of *N.*, a master being about to remove into the parish of *B.*, said to his servant, "Would you like to go with me thither?" Servant said he had no objection. Master replied, "I fear you are scarcely strong enough for the work there, but try." The servant went into *B.*, and, after serving his master for six weeks, the latter asked him what wages he expected; to which he answered, "What you please." The master then said he would give him the same as the year before; with which he

was satisfied, and remained in the service until *Michaelmas*, minus ten days; for which period the master deducted a proportionate amount of wages:—Held, that this was a conditional hiring, and conferred a settlement on the servant.

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vice till within ten days of the next *Michaelmas*, when, on a quarrel, they parted, and the master deducted seven shillings for ten days. The question was, whether the pauper was settled in *Brandon*.

Flannagan and *Dover*, in support of the order of Sessions, contended, that there was no hiring to serve for a year in the parish of *Brandon*, and therefore the pauper was legally settled in *Northwold*. The conversation between the pauper and the master, when the year's service in the latter parish was ended, clearly did not amount to a yearly hiring, and the test of this was, that at any time during the six weeks, when the pauper served in *Brandon*, the master might have turned him away without notice, and without paying him any wages, there being no contract for the payment of wages until the end of that time, and in like manner the pauper might also have left his master without notice. It could not be said that the service in *Northwold* might be connected with that in *Brandon*, so as to continue the same relation of master and servant. The contract in *Northwold* was complete and ended, before the pauper went into *Brandon*; and it was not until six weeks afterwards that any fresh contract was made. At the end of the six weeks the master clearly might have said, "You do not suit me, and therefore I shall not keep you." This proved to demonstration that there was no hiring for a year in that parish. They cited *Rex v. Ilam* (a), *Rex v. Hoddesdon* (b), and *Rex v. Marton* (c). Whether in fact there was a second hiring for a year, was peculiarly for the Sessions to determine. The Sessions had decided, that there was no hiring in *Brandon*, and unless the Court saw that the Sessions had come to an unreasonable conclusion, they would not

(a) Barr. S. C. 304.

(b) Cald. 23.

(c) 4 T. R. 257.

disturb their decision. For this they cited *Rex v. Overnorton*(a), and *Rex v. Tyrley*(b).

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H. Cooper, contra. This is at least a conditional hiring for a year in *Brandon*, and there having been a service under it for forty days, the pauper is settled in that parish. On the day before *Michaelmas*, whilst the pauper is living with his master in *Northwold*, the master asks him if he would like to go and live with him in *Brandon*. The pauper answers, that he has no objection, and accordingly he goes into that parish with his master. At that time it is quite clear, that it was in the contemplation of the parties that the pauper should live with his master until the end of the ensuing year, and that the contract was to be impliedly governed by the terms of the preceding contract. This is clearly a good settlement according to the principle of decided cases. He cited *Rex v. Under Barrow and Bradley Field*(c), *Rex v. Ashton*(d), *Rex v. Croscombe*(e), and *Rex v. Sutton*(f).

ABBOTT, C. J.—I am of opinion, that there was a second hiring for a year, to serve in *Brandon*, and therefore the orders must be quashed. Just before the end of the first year, the master says to the pauper, “Will you go with me into *Brandon*?” The pauper says he has no objection. If nothing more passed, it is clear that that would be a hiring for another year. The master then says, “I am afraid you will not be strong enough for the work there, but try.” The meaning of that is, “We shall contract for a year, but if, upon a little trial, I find you are not strong enough, then our contract is at an end.” That

(a) 15 East, 347.

(b) 4 B. & A. 624.

(c) Burr. S. C. 548.

(d) 2 Const. 273.

(e) Burr. S. C. 256.

(f) 1 East, 656.

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is a conditional hiring. The pauper tries, is found strong enough; and resides for forty days. This is a settlement.

BAYLEY, J.—It is a defeasible contract for a year, and a settlement is gained.

HOLROYD, J.—This is a conditional hiring for a year, the condition being, the pauper having strength enough to do the work. The contract is not in express terms for a year, but still that does not prevent a conditional hiring for a year operating(a).

Order of Sessions quashed.

(a) *Best*, J. was absent.

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April 26.

The KING v. SUSANNAH PALMER.

THE defendant appealed to the Sessions against a rate made for the relief of the poor of the parish of *Fornham All Saints*, in the county of *Suffolk*. The assessment was as follows:—

“ Outsetters.”

Mrs. *Palmer*, a wharf and buildings, situate in *Fornham All Saints*, adjoining the River *Lark*, alias *Burn*, and occupied and used for the purposes of the navigation of the said river, and the towing-paths, locks, sluices, and other works, within the said parish of *Fornham All Saints*, also occupied and used for that purpose, and the tolls arising therefrom, due at *Fornham All Saints*.

£250

Where the owner of a river navigation, running through fourteen different parishes, was rated to the poor of the fourteenth parish (in which the profits arising from the whole navigation were received) in respect of the whole amount of the profits: Held, that the rate was too high, and ought to have been apportioned among all the parishes through which the navigation passed.

The Sessions confirmed the rate, subject to the opinion of this Court on the following case:—

By an act passed 11 & 12 *Will. 3*, intituled, “An Act for making the River *Lark*, alias *Burn*, navigable,” *Henry Ashley*, Esq. his heirs and assigns, were empowered and authorized to make navigable the River *Lark*, otherwise *Burn*, from a place called *Long Common*, a little below *Mildenhall* mill, to *Bury St. Edmunds*, and for that purpose to cleanse and open the river, and to dig and make cuts and water-courses; to erect and build sluices and bridges, and to set out and appoint towing-paths and haling ways through, over, and along the ground adjoining or near to the said river, being the ground of the King or any other person or persons, first giving such satisfaction to the owners and proprietors of the said ground, as certain Commissioners appointed by the act should direct; and it was also provided, that, after such payment, the said *Henry Ashley*, Esq. his heirs and assigns, should have, use, and enjoy the said cuts, water-courses, bridges, sluices, towing-paths, and haling ways, in as ample and beneficial a manner as if the same, by good title and sufficient conveyance in the law, had been absolutely sold and conveyed to him, his heirs and assigns. By sec. 12, the said *H. Ashley*, his heirs and assigns, were empowered to demand and receive, for the freight of goods up the river, from *Mildenhall* mill to *Bury*, or down the river, from *Bury* to *Mildenhall* mill, at such place or places adjoining the said river, as he, his heirs or assigns, or their deputies or servants, should think fit, certain rates or tolls therein mentioned, and a proportionate rate or toll for any less distance. By an act of the 57 *Geo. 3*, for amending the last-mentioned act, certain Commissioners were empowered to direct the haling ways of the River *Lark* to be widened, and to ascertain what sum or sums of money should be paid by the proprietors of the navigation as a

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recompense, for the use of the lands or grounds which should be set out and directed to be taken, had, and used for such haling ways. By a private act, 41 *Geo. 3*, for inclosing the common fields and waste grounds in the parish of *Fornham All Saints*, part of which common fields and waste grounds adjoining the said river, Commissioners were empowered to set out public and private roads, ditches, fences, banks, drains, and water-courses; but it was provided that they should not make, do, or execute any work, bank, drain, water-course, fence, or other thing whatsoever, which should occasion any impediment to the navigation of the River *Lark*, the overfalls, drains, and landing-places, or to the haling ways or towing-paths, upon or along the banks of the river, belonging to the navigation or the proprietor thereof: Provided also, that in setting out the width of the haling banks (if any should be set out) respect should be had to the soil so to be set out, and that after the same should have been separated from the remainder of the land intended to be allotted and drained, the same should become vested in, and at all times thereafter supported and kept in repair by the owner or proprietor of the said navigation, freed and discharged from shuckage, and all rights of common. The act contained the general saving clause.

The counsel for the appellant contended, that this act was not admissible in evidence, unless it was proved that the appellant was a consenting party thereto. By the award of the Commissioners certain copyhold lands, situate in the said parish of *Fornham All Saints*, but distant from the line of the navigation, was allotted to the appellant under the provisions of the said act, to which she was duly admitted, and of which she has ever since been and is now in possession. The Inclosure Act was admitted, subject to the opinion of this Court. In pursuance of the Inclosure Act, the Commissioners by their

award, dated 22d September, 1804, set out and appointed, within the parish of *Fornham All Saints*, a haling way or towing-path, of twelve feet, along the west side of the River *Lark*, where it had been customary and usual to hale or tow, within the same parish, for the use and convenience, and as the property of the appellant and her heirs, proprietor or proprietors, for the time being, of the navigation, and for the use and convenience of all other persons using or navigating upon the same, for the purpose of haling or towing thereon. Mr. *Ashley*, the original undertaker, from whom the defendant, through her late husband, derives her title, made the river navigable from *Mildenhall* to *Fornham All Saints*, a distance of twelve miles and a half, but it was never made navigable as far as *Bury*, nor beyond *Fornham All Saints*. This navigation extends through fourteen different parishes, and is the boundary between *Fornham All Saints* and *Fornham St. Martin's*, half of the channel to the centre thereof being in the former, and half in the latter parish; but the towing-path, and the half of one sluice, and two locks, are in *Fornham All Saints*, the remaining half of the same sluice and locks being in *Fornham St. Martin's*. The towing-path is separated from the adjoining lands by a ditch. The appellant is not an inhabitant of *Fornham All Saints*, but resides in *Bury*. She is the owner, under a distinct title, of a wharf or coal yard, of about four acres, lying in the former parish, and adjoining to and situate at the extremity of the said navigation, in which said wharf are several warehouses and other buildings. Different portions of this wharf or coal yard are from time to time allotted by the agent of the appellant to the principal coal merchants who use this navigation, to the number of fourteen or fifteen. They pay no rent for these portions, but keep the division fences of their respective portions in repair. These different

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portions are varied from time to time by the agent of the appellant. Large quantities of coals are carted at once from the boats, and not deposited in the coal yard; but it is necessary, for the accommodation of the wholesale dealers, using the navigation, that they should have a place whereon to deposit their goods, but the appellant is not bound to provide such place. The buildings and the outer fences, and walls inclosing the wharf, and the towing-paths, locks, and sluices, are repaired by the appellant, and were erected by her or her ancestors; but it was not admitted by the appellant on the trial of the appeal, and save as aforesaid it did not appear, that all these things were repaired by her as owner of the navigation. Up to the year 1816 the appellant was rated on a rental of 17*l.* for the coal yard, and no rate was imposed upon the profits of the navigation. The annual value of the coal yard, as mere land, is not above 3*l.* Since the year 1816, up to the making the assessment appealed against, she has been rated in the parish of *Fornham All Saints*, for tolls arising from the navigation and warehouses at 250*l. per annum*. The tolls becoming due and received by the appellant for goods landed in the parish of *Fornham All Saints*, equal the amount of the assessment.

Denman, C. S. and *Tindal*, in support of the rate, endeavoured to distinguish this case from *Rex v. Milton*(a), and *Rex v. The Trent and Mersey Canal Company*(b), and urged the difficulty of apportioning the rate, but the Court having intimated that the late decisions were quite conclusive of the question, the argument was abandoned.

ABBOTT, C. J.—I am of opinion that the defendant has been rated too high in the parish of *Fornham All*

(a) 3 B. & A. 112.

(b) Ante, 403.

Saints. The case of *Rex v. The Trent and Mersey Canal Company* is the converse of this case, nor is it distinguishable in principle from *Rex v. Milton*. Here the navigation runs through fourteen different parishes, and the whole is rated to the amount of £50*l.* in the parish of *Fornham All Saints*. Now, having decided that a canal is rateable in each and every parish through which it passes, it follows that this rate should have been separated into fourteen different portions, instead of being imposed entirely in one parish. If this were not so, the navigation might be rated twice over. The principle upon which this is founded, is very plain and simple. I have the utmost reverence for the learning of the Judges who decided some of the former cases upon questions of this nature, where a contrary doctrine has been held, but still of late years, the Court has been gradually coming to what is the true principle, and unquestionably the common sense of the thing, namely, that in whatever parish the land is occupied, as land covered with water, and is productive of profit to the proprietor, it is to be rated in each and every parish, according to the profit it produces, although they may not be received in that parish, but in another and a different parish. Now, this rate has not been imposed upon that principle, and, therefore, it must go down to the Sessions to be amended.

BAYLEY, J.—I am of the same opinion. If the rate is imposed for the use of a sluice, the proprietor will have to contribute to the relief of the poor in the parish where the sluice is situated; but if it is for the use of the navigation, and for the use of land extending through a great many different parishes, each parish has a right to be paid in respect of the land on which the navigation is so used. The defendant is liable to be rated in the parish of *Fornham All Saints*, for something, but not to

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the extent of this rate. The Sessions must rehear the appeal, and reduce the rate according to their discretion.

HOLROYD, J., concurred.

BEST, J., was absent.

Rule ordered to be amended.

W. E. Taunton and *Dover* were to have argued the case for the defendant.

Saturday,
April 26.

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The proprietors of a river navigation are rateable to the relief of the poor in a parish through which the navigation passes (though no riverage dues are received in such parish), in proportion to their profits upon the whole line of navigation.

The KING v. The EARL of PORTMORE and Another.

UPON appeal against a rate made on the 15th *April* last, at two shillings in the pound, for the relief of the poor of the parish of *Woking*, in the county of *Surrey*, whereby the Earl of *Portmore* and *J. S. Langton*, Esq. were rated as proprietors of the River *Wey*, at 32*l.* 10*s.*; the Sessions confirmed the rate, subject to the opinion of this Court, upon a case.

The appellants are proprietors of the navigable River *Wey* from *Guildford* to the River *Thames*; and by an act of 22 & 23 *Car. 2.* are entitled to receive certain riverage dues upon barges and other vessels navigating the river. They are not themselves inhabitants of the parish of *Woking*, nor are they carriers upon the river, but they grant licenses under certain regulations to the owners of barges, &c. navigating the same, upon payment of certain riverage dues upon goods conveyed upon the river. The navigation of the River *Wey* extends for a considerable distance within *Woking* parish. There are in all ten locks upon the navigation, one of which, called *Trig's* lock, is locally situated within the parish of *Woking*. No tolls are collected at that lock, or at any place within the parish, but the several wharfingers along the line of the na-

vigation receive from the different barge-masters, according to certain rules laid down in 1764, an account of whatever goods are loaded or unloaded at their respective wharfs, and make an entry thereof in a book kept by each of them for that purpose. From these books they furnish quarterly to the receiver, appointed by the proprietors of the navigation, on account of the riverage, &c. due in respect of such goods, and he from these accounts makes out and delivers to the different barge-masters bills for the tonnage or riverage due from them respectively, and receives the amount thereof for the use of the proprietors. The appellants are not rateable to the relief of the poor of the parish of *Woking*, except so far as they are rateable in respect of the River *Wey*, or the locks or riverage thereof. Many tons of goods annually pass through the parish of *Woking*, to and fro, in vessels using the navigation, to different places of destination, but the goods annually landed within the parish do not yield riverage to the amount in the rate assessed. If the Court should be of opinion that the proprietors of the navigation are not rateable beyond the amount of the riverage arising from such last-mentioned goods, then the rate is to be amended, by reducing the amount of the assessment on the proprietors to the sum of —*l.*; if otherwise, the rate is to stand at its present amount.

C. Monro, for the defendants, was instructed to contend that they were only rateable in respect of the riverage dues, arising from the goods actually landed within the parish of *Woking*, and not in proportion to the profits arising upon the whole navigation; but after the case last decided of *Rex v. Palmer(a)*, he felt that he could not resist the confirmation of the rate to the amount for which the appellants were assessed.

(a) Ante, 416.

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The Court said, that it was now too late to contend against the principle upon which this rate was founded.

Rate confirmed.

Cowley was to have argued in support of the rate.

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A pauper was hired as a labourer in husbandry to serve a farmer, under an agreement that he was to have yearly wages, and his master either to find him two cows, or provide himself with two, and feed them on his master's farm. The pauper bought one cow, and his master found him another, both of which were fed during the summer in his master's pasture, and, in the winter, were kept in his master's straw yard, and fed with hay grown upon the farm. The pasture and the hay feed-
 ing were respectively worth 5*l.* 5*s.* a-year:—Held, that the pauper did not gain a settlement by renting a tenement of 10*l.* value. *Aliter*, if the contract had been that the cows were to be pasture fed.

UPON appeal, the Sessions confirmed an order of two Justices for the removal of *Thomas Watson*, and *Mary* his wife, and their son *William*, from the hamlet of *Leverington-Parson-Drove*, in the Isle of *Ely*, to the hamlet of *Sutton Saint Edmunds*, in the county of *Lincoln*, subject to the opinion of this Court, upon the following case:—

The pauper being settled at *Sutton Saint Edmunds*, and having been married several years, at *Lady-day*, in the year 1793, agreed with a farmer of the name of *John Ulyatt*, in *Leverington-Parson-Drove*, to serve him as a confined labourer in husbandry, (that is, to work for him, and no other person) for a year. The terms of the agreement made between the pauper and his master, were as follows:—The pauper was to have 8*l.* a-year wages, his master was either to find him two cows, or the pauper was to be at liberty to provide himself with two, and feed them on his master's farm during the same year; and he was to have the further privilege of keeping two ewes on the farm during the whole year, and the running of a pig at the barn door, and in the straw yard, during the same time. The pauper went into the service of

Mr. *Ulyatt*, under this agreement, at *Lady-day* 1793, and continued therein till *Lady-day* 1797, under contracts to the same effect. During the first three years of such servitude, the pauper lived in a house on his master's farm in *Wisbech High Fen*, and the last year of such service, in a cottage at *Leverington-Parson-Drove*. The occupation of the cottage was incidental to the service of the pauper, who was discharged from it at the same time he left his service. The pauper bought one cow, and his master found him another, both of which were fed during the summer, in the pasture of his master, and in the winter were kept in the straw yard of his master, and fed with hay that was grown upon the master's lands, and the pauper had the exclusive use and advantage of such cows, and he also kept two sheep and a pig on the farm during the whole year. If the pauper had not had such cows and sheep and pig kept for him on his master's farm, he would have had more wages, and at the time he left Mr. *Ulyatt's* service in 1797, he took his cow, sheep, and pig with him. Evidence was given to the Court that the keep of the two cows during the summer months would require two acres and a half of land on which they were fed, and that such acres were worth together annually 5*l.* 5*s.*, and that to cut hay sufficient for the winter keep would require two acres and a half more of such land, of the annual value of 5*l.* 5*s.* and that the summer feed and winter keep, with hay for the two cows, on such farm, were of the annual value of 10*l.* 10*s.* and that the keep of the two sheep on the farm during the year, was of the annual value of 1*l.* 6*s.*, and the keep of the pig at the barn door and straw yard, where it was fed on the produce of the land, was of the annual value of 1*l.* 19*s.* The valuation of the two cows, the two sheep and pig, for the whole year, forming, together, 13*l.* 15*s.* 6*d.* The Court of Quarter Sessions did not consider that the keeping and feeding of the cows, sheep,

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and pig, under the above circumstances, constituted such a tenement as gave the pauper a settlement at *Leverington-Parson-Drove*, and therefore confirmed the order of removal.

*Puller*, in support of the order of Sessions. The pauper gained no settlement by renting a tenement within the meaning of the statute 13 & 14 *Car. 2. c. 12*, in *Leverington-Parson-Drove*. It has never yet been decided in any of the cases, that a pauper can gain a settlement under a contract to feed cows generally, and the question is, whether the agreement, as found in this case, to feed the cows, can be construed into a tenement, so as to confer a settlement of the requisite value, coupled with the keep of the sheep and the run of the pig. It has been decided that a contract to feed cows generally, under which they might be fed with green tares bought in the market, would not be a tenement within the act (a). This was the opinion of *Lawrence, J.*, and also of Lord *Ellenborough, C. J.*, who said, "If indeed the cow might under this contract have been fed elsewhere on grain or hay, the consequence would follow that this was not a taking of a tenement." Unless, therefore, in the present case, it can be maintained that the feed of these cows during the winter months upon hay, brought from the land to be eaten in the straw yard, and which is estimated at 5*l.* 5*s.*, can be considered as part of the tenement, the whole of the tenement falls to the ground, inasmuch as the feed during the summer is stated to be worth only 5*l.* 5*s.* To constitute this a tenement within the cases, the pernancy of the profits of the land must be taken by the mouths of the cattle whilst the produce is growing. Feeding with hay severed from the land is not sufficient. Here part of the feed consisted of hay, and consequently there

(a) *Rex v. Tisbury*, Mich. 45 *Geo. 3.* 2 *Nol. P. L.* 17. 3d edition.

is no tenement. If this be a tenement, it will be next contended, that sending cattle to a straw yard will be sufficient to confer a settlement. The case of *Rex v. Minster*(a), which will be relied upon on the other side, is no authority to govern the present case, because it was there conceded that the cows were fed upon *the pasture*, which was worth 10*l.* a year, and the distinction between that case and this is, that here, during the winter, the cows were fed upon hay, which might have been gotten elsewhere if there was not sufficient grown upon the farm for the purpose. The contract here is merely personal, and cannot be construed to have any relation to the land so as to constitute a tenement. An action might be maintained for the breach of the contract for not feeding the cows, but it never can be contended that such a contract savours of the realty. In another particular this case is distinguishable from *Rex v. Minster*, because here one of the cows belonged to the master, but there they were hired by the pauper of a third person. In *Rex v. Oswabeston*(b) the Court decided, that the milking of a cow would not confer a settlement though fed by the owner, unless the bargain was, that she was to be *pasture fed*. This is a decisive authority upon this case, and as the contract here was, not that the cows were to be pasture fed, the case is distinguishable from any hitherto decided, and therefore the Sessions did right in holding this not to be a tenement. He cited *Rex v. Darley Abbey*(c), *Rex v. Stoke upon Trent*(d), and *Rex v. Hollington*(e).

*Reader* and *S. M. Phillips*, contra. The case of *Rex v. Minster* is an express authority in point, and not at all distinguishable from the present case. Unless the Court shall decide that case to be no longer law, it must govern

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(a) 3 M. &amp; S. 276.

(b) Mich. 1818, not reported.

(c) 14 East, 282.

(d) 10 East, 496.

(e) 2 East, 113.

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the present. The circumstance of one of the cows here being the property of the master makes no sort of difference, because the pauper had still the pernancy of the profits of the land by the mouths of both the cows, though they were not both his property. The case expressly finds that the cows were to be fed upon the *produce of the farm*, and it makes no difference whether they were to be kept upon grass during part of the year, and hay during the remainder, so long as the grass and the hay were the produce of the land. In *Rex v. Minster* there was nothing distinctly to shew that the cows were to be pasture fed and pasture fed only. The contract there was the same as here; the cows were to be fed on *the master's farm*. In *Rex v. Oswabeston* the contract was merely personal, and the cow might have been kept upon grains or hay bought elsewhere. Here the contract is, that the cows shall be fed upon the farm, and unless therefore the Court are disposed to overturn *Rex v. Minster*, the pauper in this case clearly gained a settlement by renting a tenement. [Bayley, J. The case of *Rex v. Oswabeston* was the wiser decision.]

ABBOTT, C. J.—It has been settled in several cases that the pernancy of the produce of land by the mouths of cattle is a tenement. Any body looking at the mere words of the statute *Car. 2*, might wonder that the Court could ever have come to such a decision. Very learned Judges, however, have so decided, and their decision has been followed, and I certainly do not mean to disturb that doctrine. It follows as a consequence from that, that a contract to enjoy the produce of land, of the annual value of 10*l.*, by the mouths of cattle, is taking a tenement. I repeat that I do not mean to disturb that doctrine; but acting upon the authority of *Rex v. Oswabeston*, I think the contract must be for the *growing* produce of the land, and whilst the produce remains on the land;

but that after the produce is converted into hay or straw, that is not to be deemed a tenement. The contract here stated, is certainly not distinguishable from that in *Rex v. Minster*. In that case the contract was, that the pauper should have the feed of two cows, to be fed on the master's farm. That, probably, might be understood generally to mean, that they were to be fed with the produce of the farm in the manner in which cows are generally fed, that is, partly by the growing produce, and partly after the produce was harvested. The Court there held, that that was taking a tenement; but it is to be observed, that in that case no question was made as to the manner in which the cattle were to be fed. No distinction was there taken between the *growing* produce, and the *severed* produce. It was taken on all hands, both at the bar in argument, and by the Bench in deciding the case, that the cattle were to be fed with the growing produce; and *Le Blanc, J.*, stated, in giving his judgment, that the yearly value of "*the pasture*," was so much. That case was argued entirely upon this point, namely, whether, inasmuch as the pernanacy of the feed of the cows was, in respect of the service of the pauper, a part of his wages, that could be considered as taking a tenement. The whole attention of the counsel, and of the Bench, was entirely directed to that point; and if the decision of that case turns out to be wrong, because the distinction between growing and severed produce was not pointed out, we are not bound to act upon it in the present case. In this case, the distinction is clearly pointed out, by the facts which are laid before us. The case states, that the growing produce is worth so much, and the severed produce so much, distinguishing expressly one from the other. In the case of *Rex v. Os-wabeston*, the contract was in some respects different from this. There it was for the feed of a cow, without

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saying "on the farm," and inasmuch as it did not appear that the cow was to be *pasture fed*, the Court held, that no settlement was gained, and quashed the order. Here the contract was not for the growing produce. It was not so in words, nor was it so in fact, because the growing produce was not actually taken. I therefore think the case of *Rex v. Minster* ought not to govern our judgment, if the point there was improperly conceded, and the attention of the Court was not directed to it. In *Rex v. Oswabeston*, the attention of the Court was called to the distinction between taking the *growing crop* and the *severed crop*: and it being found here, that the growing crop was less than the value of 10*l.*, I am of opinion, that the settlement contended for, is not made out.

BAYLEY, J.—When this case was first presented to my mind, I was inclined to think that the cow belonging to the master, could not be taken into consideration, but upon reflection, I think it might. On the other point, however, I agree with my Lord Chief Justice, that in order to constitute a tenement by feeding cattle, the contract must be to take the growing produce of the land, and not the severed produce. According to the cases, the permanency of the growing produce of land by the mouths of cattle, is coming to settle upon a tenement; but it would be an entire new head of settlement, by renting a tenement, if it were to be held, that the liberty to turn cattle into the straw yard, or to have them fed on hay, was sufficient. The mode of feeding the cattle in this case certainly does not constitute a tenement. They were to be fed by taking the produce of the land with their mouths in the summer time, and in the winter by feeding on hay in the straw yard. Now if the mode of feeding during the latter period

could not be considered *per se*, as taking a tenement, it would not be taking a tenement when connected with a feeding off the growing crops of the land by the mouths of the cattle. I am therefore of opinion, that, in this case, although the taking of the produce by the cattle when fed upon the land, may be considered as a tenement, yet when they are to be fed upon hay in the straw yard, that is not taking a tenement, and cannot be brought into account. In *Rex v. Minster*, certainly the distinction between what I call dry food and green food, was not taken. It was conceded by Mr. *Bolland*, who argued against the settlement, that there was an interest issuing out of the land of the value of 10*l.*, and the Court acted upon that concession, and did not attend to the distinction which was afterwards taken in *Rex v. Oswabeston*. The decision in *Rex v. Minster*, I have reason to think produced a great deal of uneasiness and much mischief in many parts of the country, as far as it operated to the prejudice of a very meritorious class of servants, who, for a considerable time, had been allowed privileges of this description, and who were generally hired upon that footing, but who, after that decision, were deprived of these advantages (which, to married men, were of great importance), the occupiers of land not choosing to burthen their parishes by this mode of gaining a settlement. The effect produced by that decision drew the attention of the Court more particularly to the point there determined, and therefore when the case of *Rex v. Oswabeston* came before the Court, they adopted the true distinction, and said, that if the servant makes a contract that the cattle shall be *pasture fed*, then he will be considered as taking the profits of the land by the mouths of the cattle, and thereby renting a tenement of 10*l.* a year, if the pasture be worth so much; but if he leaves the contract at large, and does not bargain that they shall be *pasture fed*,

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although in point of fact they are so fed, then that shall not be sufficient to confer a settlement. That was the principle upon which *Rex v. Oswabeston* was decided. There the pauper was to have the milk of a cow to be kept by the owner, and the value of the keep would make up the necessary value 10*l.*; but the Court said, that inasmuch as it was no part of the contract that the cow should be *pasture fed*, but that the owner was at liberty to feed it otherwise than by pasture feeding, that could not be considered as a tenement. The question here is, whether pasture feeding was any part of the bargain. The only bargain was, that the master was either to find the pauper two cows, or he was to be liberty to provide himself with two, and feed them on his master's farm. The master, therefore, was to provide feed for them, but there was no stipulation as to what species of food it was to be, and of course no bargain being made as to the species of food, it was left entirely to the discretion of the master in what manner they should be fed. The cattle were clearly not to be pasture fed summer and winter; for in the winter they would starve, unless hay was provided for their support. But hay being dry food, that cannot be taken into consideration with reference to the value of the tenement. Then inasmuch as the pasture feeding in this case does not amount to the requisite value of 10*l.*, no settlement is gained, and therefore I am of opinion that the order must be confirmed. Since the statute 59 *Geo. 3. c. 30.* this question cannot arise again.

HOLROYD, J., concurred.—The right of *pasturage* for the cattle does not amount to 10*l.*, and therefore no settlement is gained(a).

Order confirmed.

(a) *Best*, J. was absent.

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The KING v. The INHABITANTS of LAKENHEATH,
in SUFFOLK.

Saturday,
April 26.

ON appeal against the removal of *Herbert Bailey, Elizabeth* his wife, and their four children, from *Chippenham*, in *Cambridgeshire*, to *Lakenheath*, in *Suffolk*, the Sessions confirmed the order, subject to the opinion of this Court, on the following case:—

The pauper, *Herbert Bailey*, was settled by birth in *Lakenheath*, but had resided for the last seven years in *Chippenham*, under the following circumstances:—*Edward Russell*, Earl of *Orford*, by his will, dated 2d *March*, 1736, charged his manor of *Chippenham*, &c. with the payment of one annuity or rent-charge of 10*l.* *per annum*, to be paid to *Thomas Reynolds*, Esq. and the Rev. *Clement Tookie*, of *Chippenham*, clerk, and their heirs and assigns, for ever, in trust, to be by them paid to the minister, churchwardens, and overseers of the poor of the parish of *Chippenham*, for the time being, to be distributed among the poor house-keepers who did not receive alms from the said parish, and also with one other annuity or rent-charge of 20*l.* *per annum*, to be paid to the said *Thomas Reynolds* and *Clement Tookie*, their heirs and assigns, upon trust, to be by them paid yearly, and every year, unto a person, to be, from time to time, made choice of, and nominated by the person or persons who, for the time being, should be entitled to the manor of *Chippenham*, to officiate as school-master in the said parish, for the teaching of the children thereof, for no other reward than the said annual sum of

A testator charged his manor and lands with an annuity of 20*l.* to be paid by trustees to a parish school-master, to be nominated by the person or persons who, for the time being, should be entitled to the possession of the manor. In pursuance of the will, a school-master was appointed, and received the annuity for seven years, during which time he had the possession of a house (rent free, but worth 10*l.* a year), which was assigned to him as his residence in the character of schoolmaster:—Held, that such residence gained him a settlement within 13 & 14 Car. 2, though by the terms of the will, he was liable at any time to be dis-

missed from the office of school-master, at the will and pleasure of the donor.

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20*l.*, which was to be paid to the school-master, without any allowance or deduction for taxes, or otherwise, with a proviso, that the said respective school-masters, to be nominated as aforesaid, should, from time to time, be removable, and others, from time to time, made choice of and nominated in their room, at the will and pleasure of the person and persons who, for the time being, should be entitled to the immediate possession of the said manor. Upon the death of a former school-master, about seven years ago, *Charles Wedge*, then the receiver of the *Chippenham* manor and estates under the Court of Chancery, considering that he had a right to appoint, offered to *John Tharp*, Esq. then residing in the manor-house, the compliment of nominating another person to the situation of school-master. Mr. *Tharp* accordingly nominated the pauper to be school-master, under Lord *Orford's* will, which the said *Charles Wedge*, the receiver, agreed to. The pauper resided at *Chippenham* during the seven years as aforesaid, until the present order, in the house, rent-free, wherein his predecessors, the school-masters, had resided before him, and he received the annual sum of 20*l.* during the first three years, from the said *Charles Wedge*, and afterwards from *John Tharp*, Esq. since he has been the receiver of the *Chippenham* manor and estates. The house, and garden attached to it, were of the value of 10*l. per annum*, part of which he underlet to the parish at the annual rent of 2*l. 2s.* during the said seven years. The said *Charles Wedge*, during the time he was receiver (from disapprobation of the pauper's conduct) suspended payment of his salary for two years, but afterwards, at the intercession of Mr. *Tharp*, paid the whole, Mr. *Tharp* also, by reason of the pauper's misconduct, gave him notice, in *December*, 1820, to quit within a month, but afterwards allowed him to remain, which he did until his removal to *Lakenheath*. It also appeared in evi-

dence, that a former school-master, named *Robinson*, who held the situation forty-three years ago, and resided in the same house for about two years and a half, was dismissed for misconduct, in not attending regularly at church with the charity children, and upon his refusing to quit the house, he was, with his goods and chattels, forcibly turned out by two constables of the parish, the Rev. *Clement Tookie*, then clergyman of the parish, who died about twenty-five years ago, aged eighty-one, being present at the time, and aiding therein; and that about a month after *Robinson's* expulsion, one *John Creek* succeeded him in his situation, and lived in the same house. The annual sum of 20*l.* was paid to the pauper, both by *Charles Wedge* and Mr. *Tharp*, out of the *Chippenham* manor and estates, and it was allowed them in their accounts by the Master in Chancery.

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*Scarlett* and *Nolan*, in support of the order of Sessions. Assuming that the pauper was duly appointed to the office of school-master under the directions and regulations of Lord *Orford's* will, two questions arise in this case for the opinion of the Court, first, whether the annuity or salary of 20*l. per annum*, charged upon the real estates of the donor, and received by the pauper, was sufficient to confer a settlement by estate; and second, whether the pauper's residence in the house assigned him, being of the annual value of 10*l.* was sufficient, under the circumstances of the case, to gain a settlement within the meaning of 13 & 14 Car. 2. Both these questions are answered in the negative, by referring to the nature of the pauper's tenure. It distinctly appears, that he was removable at any time at the will and pleasure of those who appointed him. This is one of the express conditions of Lord *Orford's* will. It follows then as a consequence, that he could not be considered as irremovable

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for forty days, so as to confer a settlement(a). This is a decisive answer to the first question; but, supposing it not to be equally conclusive as to the second, there is a further reason upon that point why no settlement was gained. The occupation of the house is connected with the pauper's service and duty as a school-master, and therefore he does not stand in the relation of tenant. In a great number of cases it has been decided, that the occupation must be in the character of tenant to gain a settlement. Here the pauper had no interest whatever of his own in the tenement. The residence in the school-house was an incident to the office of school-master. He was removable from that office at the absolute will and pleasure of the lord of the manor, and if he were removed from the office, it followed as a consequence that his right to hold the tenement ceased *instantly*, and he might be forcibly turned out. Supposing him to be tenant at will, still he might be turned out, without the formality of legal process, and there would be an end to the settlement. Upon this point *Rex v. The Inhabitants of Cheshunt*(b), is a decisive authority. The fact of the pauper having underlet a portion of the tenement at an annual rent of 2*l.* 2*s.* makes no difference in the case, because he had no other interest in the premises but what was coeval with his office, and, as soon as he was dismissed from his situation, his interest in the tenement also ceased. The mere act of letting a part of the tenement is not conclusive, unless it can be shewn that he had a right to let it. This right is negatived by the facts of the case, and all argument on this ground must completely fail. The cases of *Rex v. Melkridge*(c), *Rex v. Minster*(d), and other similar cases, are distinguishable

(a) *Rex v. Uttaxeter*, Burr. S. C. 538. *Rex v. Stone*, 6 T. R. 295.

(b) 1 Barn. & Ald. 473.

(c) 1 T. R. 598.

(d) 3 M. & S. 276.

from this, because in all those the tenements were totally disconnected with the service. Upon this distinction the opinion of *Bayley, J.*, in *Rex v. Kelster (a)*, is quite decisive. On the other side, *Rex v. Owersby le Moor (b)*, from the similarity of its circumstances, may be relied upon; but it is materially distinguishable from the present case. There the school-master, who was entitled to the profits of a certain farm for his services, actually occupied a part of the trust estate himself under an agreement. The appointment was for life, and being irremovable by the trustees, the Court decided that the settlement was gained. On these grounds the order of Sessions must be confirmed.

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Dover, contra. The pauper gained a settlement in *Chippenham* upon both or either of two grounds; first, by the occupation of a tenement of the yearly value of 10*l.*; and, second, by receiving a rent-charge of 20*l. per annum*, payable out of lands in that parish. Upon the first point the case finds that the pauper resided in the school-master's house rent free for seven years, until the date of the order in question, and that during that period he underlet part of the tenement to the parish at two guineas *per annum*. It has been argued, that by such residence the pauper could not gain a settlement, because he was not irremovable for forty days. Supposing it could not be contended with success that the pauper gained a settlement by estate, yet it is perfectly clear that if he had a right of occupation, his title is quite immaterial. Here he had a right of occupation, and the tenement being of the annual value of 10*l.*, he is settled within the meaning of 13 & 14 *Car. 2.* It is no answer to this argument that the trustees or the lord of the manor might have removed him at any time; the question is,

(a) 5 M. & S. 136.

(b) 15 East, 357.

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could the parish officers have removed him, or could the Magistrates upon their application have removed him. It does not follow, because his right to occupy the school was defeasible by the trustees, who might have turned him out if he did not perform his duty, that the parish officers might have removed him, and so have defeated the settlement. It is sufficient that he has the beneficial occupation, without regard to the nature of his title. *Rex v. All Saints in Derby* (a). The case of *Rex v. Fillongley* (b) seems decisive of this point. In that case the pauper lived upon a tenement of 10*l.* a year, given him out of charity, and the Court decided that he came to settle within the meaning of the statute. Can it be said that the pauper in this case had not the beneficial occupation? This is not a case of occupation merely; for the case finds that he underlet part of the tenement and received a rent of 2*l.* 2*s.* per annum. Quoad that, at least, it is clear that he was the beneficial occupier. The case of *Rex v. Cheshunt* was determined expressly on the ground that the occupation of the house was not in the character of tenant, but of servant. The fact of underletting distinguishes this from those cases where a servant has been allowed to reside in a house as a mode of paying his wages. Here the pauper resides not as a servant, but in the character of tenant, and he was clearly irremovable by the parish officers.

The Court stopped him.

ABBOTT, C. J.—I think this first point is decided by *Rex v. Fillongley*. We cannot consider this person as an occupier of the house in the character of servant, inasmuch as here there is no master to whom it can be predicated he owes any service. Whether he occupies in

(a) 5 M. & S. 90.

(b) 1 T. R. 458.

virtue of his appointment as school-master or not, appears to me to be perfectly immaterial. He takes possession of a tenement which is found by the case to be of the yearly value of 10*l*. It does not distinctly appear to whom the house belonged, but he occupies for a considerable length of time, and I think it may be conceded that he had no right to hold the house longer than he held the office of school-master; but still he comes to settle upon a tenement within the meaning of the statute of *Charles*, according to decided cases. The case of *Rex v. Fillongley* is decisive. There the pauper's brother said, "I will give you a close in the parish of *A.*, containing about four acres, to enjoy as long as I please, and to take it again when I please, and you shall pay nothing for it," and it was held, that such possession, when coupled with residence, conferred a settlement. To be sure that is as strong a case in support of this as possibly can be? for, supposing the pauper to be removable at the will and pleasure of the lord of the manor, still a settlement would be gained by his residence for forty days. No authority is cited contravening this doctrine, and therefore I am of opinion that the pauper has gained a settlement by residing on this tenement under the circumstances stated.

BAYLEY, J.—I am of the same opinion. If the property is of the value of 10*l*., it is not necessary the party should pay any rent for it. If he is allowed to occupy rent free, still that will be sufficient to confer a settlement. Here, though the pauper may be considered as giving a part of his services for the privilege of being allowed to reside in this house, yet he holds in the character of tenant at will; and if he is allowed, with consent of the owner of the property, to come for the purpose of permanent residence in the parish upon a

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tenement of 10*l.*, I think he comes to settle. He comes, not for a temporary purpose, but for a permanent residence, and I think that is the meaning of the words "to settle."

HOLROYD, J.—I am of opinion that a settlement was gained by renting a tenement of 10*l.* a year. In point of law the pauper was, in the strict sense of the word, tenant at will, and was the person whom the law considers as being in the possession of the school-house, and not the lord of the manor, or the receiver of the rents of the manor. In the case of master and servant, the servant enjoys under his master either as tenant, or he has merely the use of the residence for his master's service, in which latter case the possession is considered that of the master; but it cannot be said here that the school-master was the servant of the person by whom he was appointed, or enjoyed the house as a servant, unless there is something to shew that the possession of the house was retained by the donor or person appointing him. The legal and the virtual possession must be considered in him until the tenancy is put an end to by those who have a right to do so(a).

Order quashed(b).

(a) *Best*, J., was absent.

(b) Vide *Rex v. St. Michael's, Bath*, 1 East, 288. *Rex v. Stockley Penroy*, Burr. S. C. 762. *Rex v. Melbourne*, Id. 244. *Natland v. Stainton*, Id. 793. *Rex v. Weburn*, Id. 785; and *Rex v. Wivelingham*, Cald. 121.

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## NOVELLO v. TOOGOOD.

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April 30.

**T**RESPASS for breaking and entering the plaintiff's house and distraining his goods. Plea, Not Guilty. At the trial before *Abbott, C. J.*, at the *Middlesex* adjourned Sittings after *Easter Term*, 1822, the plaintiff had a verdict with 2*l.* 16*s.* damages, subject to the opinion of the Court, upon the following case:—

The plaintiff, who is a *British-born* subject, rented and occupied a house in the parish of *St. James, Westminster*, and let a part thereof in lodgings, from the 5th *January* to the 13th *September*, 1821; on which latter day the defendant, who was collector of the poor rates of the said parish, entered the plaintiff's house, and distrained his goods under the usual distress warrant. The rate on which the distress was founded was duly made, allowed and published. The sum of 2*l.* 16*s.*, for which the distress was levied, was due in respect of the house, for half a year's rate, from the 5th *January* to the 5th *July*, 1821, and was regularly demanded of the plaintiff, and payment thereof refused, before the distress was made. The plaintiff, for twenty-five years last past, has been in the service of the Ambassador from the Crown of *Portugal* to the late and present King of *England*, as first chorister in the chapel to his Excellency, in *South Audley Street*, which is attached to the house of the Ambassador; and as such has received a salary from the Ambassador, payable quarterly; but the plaintiff did not live in the Ambassador's house. During all that time the plaintiff has officiated as such chorister in the said chapel twice on all *Sundays* and *Saints' days*, and *Fast days*, except on *Wednesdays* in *Lent*, when the service is performed only once a day.

Where a *British-born* subject, employed as first chorister at the *Portuguese* Ambassador's chapel, with a salary, rented and occupied a house, and let part of it in lodgings, and a distress was levied on his goods for a poor-rate:—

Held, that his goods were not protected by 7 *Ann. c. 12*, assuming him to be a domestic servant of the Ambassador.




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The *Portuguese* Ambassador professes the Roman Catholic religion, and, according to the ritual of that religion, it is necessary, to the due celebration of divine service, that there should be a person to officiate as the plaintiff did. During the time in question the plaintiff was registered with the Secretary of State as chorister to his Excellency, and his name was affixed in the sheriff's office, in the list of persons in the service of foreign ministers. During the period for which the rate became due, the plaintiff was, and acted as prompter at the *King's Theatre*, in the *Haymarket*, and also was, and acted as a teacher of music and languages, from both which employments he derived, and still derives, pecuniary advantage. The engagement as prompter at the *King's Theatre* was absolute, and contained no exception of the times when he might be engaged as chorister in the Ambassador's chapel. The question for the opinion of the Court is, whether the plaintiff is entitled to recover. If so, the verdict is to stand; otherwise a nonsuit to be entered.

*Campbell*, for the plaintiff. The questions in this case are, first, whether the plaintiff is a domestic servant of the *Portuguese* Ambassador within the meaning of the statute 7 *Ann.* c. 12; and, second, whether a warrant of distress for levying a poor rate be such process as is mentioned in the statute; for if it be, the defendant is clearly liable to an action of trespass. The material question certainly is, whether the plaintiff is such a domestic servant as is mentioned in the statute. The facts of the case clearly shew that he is a domestic servant. He has been twenty-five years in the same capacity, namely, first chorister to the Ambassador; he has performed the duties of that situation constantly in person; he has regularly received an annual salary in respect of his services; and those services are absolutely necessary to the celebration

of the Ambassador's religious devotions. All these facts are found by the case, and taken together, they clearly satisfy the meaning of the word "domestic," and entitle the plaintiff to the privilege conferred by the statute. It is true he did not reside in the Ambassador's house; if he had resided there, this question could never have been raised; but how is the case varied by that circumstance? Residence in the Ambassador's house is perfectly immaterial. The retinue of a foreign Ambassador is necessarily very numerous, and it would be utterly impossible that all the servants could reside in the identical house which is inhabited by their master. The statute is merely a confirmation of the Law of Nations; *Blackstone*, in his *Commentaries*, so describes it(a), and it is so defined in all the cases upon the subject; and it is quite clear from the writers upon the Law of Nations, that the protection was originally intended to be given to every individual belonging to the retinue, and in any manner necessary to the dignity of the Ambassador. *Vatell*. lib. 4. c. 9. ss. 104. 114. 120. *Puffendorff*, lib. 8. c. 9. s. 6. and *Van Bynkershoek*, c. 15. In *Seacomb v. Bowlney* (b) it was held, that a *chaplain* to an Ambassador, if he performed duty, was protected by the statute; and therefore a *chorister*, being a person necessary to the due celebration of divine service, is strictly within the principle of that case. In *Triquet v. Bath* (c) a *secretary* was held to be within the statute, although he had never lodged in the Ambassador's house, and had never received any wages, which are circumstances that rendered that case a much weaker one than the present. In *Carolino's case* (d) it was said by *Wright, J.*, that it was *formerly* thought necessary that a foreign Ambassador's servant should lie in the house to entitle him to protection under the statute," which seems

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(a) Vol. i. c. 7. 255.

(b) 1 Wils. 20.

(c) 3 Burr. 1478.

(d) 1 Wils. 78.

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to intimate pretty strongly that the rule had been there relaxed in that respect. In *Hopkins v. De Robeck*(a), it was said by the Court, that the words "domestic," and "domestic servant," in the statute, are only put by way of example, and a *secretary* was there held to be privileged, though his name was not registered in the office of the Secretary of State. These, indeed, are all cases of personal arrest, but there are also cases in which the statute has been treated as extending to the goods of the persons privileged. *Lockwood v. Coysgarne*(b), and *Fontanier v. Heyl*(c), were both cases of execution against the goods, and though the privilege was not allowed in either of them upon other grounds, it was admitted, that if it existed at all, it would apply to the goods as well as to the person. Therefore, upon the authority of these cases, and upon the very strong facts, which appear in favor of the plaintiff here, it seems clear that he is a person within the protection of the statute, and consequently that the distress was illegal, and he is entitled to recover the value of the goods distrained by the present action. Upon the other point, he did not think it necessary to trouble the Court, inasmuch as it would follow the first, whichever way it was decided.

*E. Lawes*, for the defendant. Upon the face of this case it is manifest, that the plaintiff's employment by the *Portuguese Ambassador* is merely colourable, and therefore he is not within the protection of the statute. He is a *British-born* subject, not living in his master's house, but occupying one of his own, which he lets out in lodgings; exercising an active profession as a teacher of music and languages, having a permanent and lucrative situation at the *Opera House*; rendering no personal or domestic service to his master, but calling himself a chorister,

(a) 3 T. R. 79.

(b) 3 Burr. 1676.

(c) Id. 1731.

and upon that single ground claiming an exemption, both for his person and his goods, from all liability to payment of rates and taxes. It is said that his services in the chapel are necessary to the Ambassador, but it is not explained how; that he has been twenty-five years in the situation, and has regularly received a salary; but who hired him, what is the amount of his salary, or by whom, or upon what condition it has been paid, does not appear. All these circumstances render it a case of great suspicion; but, independently of that, it is plain that the statute does not in any degree embrace *the goods of the servants* of the Ambassador, and therefore this action cannot be maintained. The words of the 5th section evidently confine the privilege to the *persons* of the servants, nor is there to be found in any of the writers upon the Law of Nations any argument to shew that it ever extended to the *goods* of any but the Ambassador himself. In *Delvalle v. Plomer* (a), which was an action against a sheriff for a false return of *nulla bona*, it was determined that the mere fact of the party against whom the process was directed, being a servant to an Ambassador, did not justify the sheriff for not executing the process against the goods. This however is a subordinate and comparatively unimportant point, for the strong argument in the case, and that upon which the plaintiff must fail, is, that the pretended service to the Ambassador, is not such a service as is necessary to bring the plaintiff within the operation of the statute. It is clearly a mere nominal service, in no respect rendered to the Ambassador personally, and in no degree necessary either to his dignity or convenience. Now, the cases, in which it has been decided that a nominal or colourable service will not suffice, are numerous; *Wigmore v. Alvarez* (b), *Cross v. Talbot* (c), *Martin v. Manby* (d), *Darling*

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(a) 3 Campb. 47.

(c) 8 Mod. 288.

(b) 2 Stra. 797. Fitzgib. 200.

(d) 1 Bur. 401.

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v. *Atkins*(a), *Holmes v. Gardon*(b), and many others, some of which have been cited on the other side, but which do not carry the plaintiff's case farther. The Court will watch with anxious attention to see that this privilege is not abused, and if fraud is found in the case, the plaintiff is clearly not entitled to the protection claimed. The Court has, in several recent cases, declared that privileges of this nature are not to be extended beyond their strict and proper line. *Viveash v. Becker*(c), *Tapley v. Battine* (d), and *Sard v. Forrest* (e). This case does not come within the reason of the privilege, the privilege being granted for the dignity and convenience of the Ambassador himself. What inconvenience or indignity can the Ambassador sustain from the plaintiff being obliged to contribute to the rates of the parish in which he occupies a house, which, from its size, is unnecessary to his personal residence. The decision of the Court against him will not abridge his power of attending at the chapel, and singing as usual. The Ambassador will be in no degree prejudiced, and if not, then there is an end to the only reason upon which this protection can be granted.

*Campbell*, in reply, re-urged his previous arguments, and contended, that the present case was within the principle of several of the cited authorities. The Court could not presume fraud, and unless fraud was manifestly shewn, there was not sensible reason why the plaintiffs should not be entitled to the protection of the statute.

ABBOTT, C. J.—This is an action of trespass for breaking and entering the plaintiff's house, and distraining his goods. The defendant justifies the alleged tres-

(a) 3 Wils. 33.

(b) Cas. Temp. Hardw. 394.

(c) 3 M. &amp; S. 284.

(d) 1 Dowl. &amp; Ry. T. R. 79.

(e) 2 Dowl. &amp; Ry. T. R. 250.

pass under a warrant of certain Justices of the Peace, issued for the payment of a poor rate, assessed upon the plaintiff in respect of his occupation of a house in the parish in which he resides. It is found by the case that the plaintiff is a *British*-born subject, and rented and occupied a house in the parish of *St. James, Westminster*, and let a part thereof in lodgings. The case further finds that this person has for many years been employed as first chorister to the *Portuguese* embassy, and has also been for many years filling the office of prompter at the *Italian* Opera House, and is a teacher of music and languages. My opinion in this case is founded on this single point, namely, that this is an action for taking the goods, and not for arresting the person of the plaintiff. I shall not give any opinion whether the person of the plaintiff was or was not protected from arrest. The question arises upon an Act of Parliament expressed in very general terms. It enacts that all writs, whereby the person of an Ambassador, or the domestic, or domestic servant, of any such Ambassador, may be arrested or imprisoned, or his or their goods or chattels may be distrained, shall be deemed and adjudged utterly null and void. These expressions are certainly very comprehensive. This act, however, was made in confirmation of the common law—it is to be construed according to the principles of the common law, and in questions of this kind, I think the Law of Nations is to be considered as a part of the common law. I do not know how the privileges of an Ambassador can be better defined (and I think the definition will agree with our own authors, as well as foreign writers) than by laying it down as a principle, that they extend only to what is necessary to the personal convenience, the dignity, and the religion of the Ambassador himself. It is our duty, however, to take care that we do not allow the rights of *British* subjects to sustain any prejudice

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under the pretence of a claim of privilege to which the reason of the privilege does not apply. I think the reason of the privilege does not extend to this case. I do not say it is necessary that the servant of an Ambassador should live in his master's house in order to entitle him to the protection afforded by the statute. It may on many occasions be necessary, and even extremely fit, that he should have a convenient lodging or place of residence for himself out of the Ambassador's house; and if these goods had been taken as a distress for a rate due in respect of such a lodging or place of residence, I should have paused a long time before I should have held that the case was not within the statute. But the facts found in this case are quite otherwise. The house is taken by this person, part of it occupied by him, and the remainder is let out in lodgings. That is not such a house as is requisite for his personal convenience, and if it is not so, it is not necessary to his master, in respect of whose convenience alone the privilege is allowed by the statute. If we were to allow the privilege in a case of this description, it might go to this length; every servant of a foreign minister, instead of living in the minister's residence, might hire some large house in this metropolis, and let out the greater part of it in lodgings, and occupy it for a considerable length of time without contributing to the public burthens of the parish, or even without paying the landlord's rent. Such an extension of the privilege would be quite absurd in itself, and not at all warranted by the reason upon which it is established. I think the reason of the privilege does not apply to this case, and I am quite sure it cannot be the wish of his Excellency the *Portuguese* Ambassador, or of any other foreign minister, that his servant should, under the pretext of a privilege emanating from himself, inhabit a house in this town, and let it out in lodgings, without contributing either to

the parochial or national burthens. For these reasons, I am of opinion that the defendant is entitled to judgment.

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BAYLEY, J.—I am of the same opinion. The question raised in this case is not whether the person of the plaintiff is privileged from arrest, nor whether the goods distrained were necessary for his residence in the place where he dwells, assuming that it was such as his service in the employment of the Ambassador required. The plaintiff claims an unqualified and an unlimited extent of protection for all his goods and chattels of whatever nature they may be. He thinks fit to take a house which in size is more than necessary for the purpose of his own residence, and he insists, that he is to be exempt from all parochial and other burthens, because he is in the service of an Ambassador. If we were to sanction the exemption to that extent, we should enable him to abuse that which was not intended to be his privilege, but that of the Ambassador, and the Ambassador only. Holding him liable to parochial rates will work no prejudice to the Ambassador. He will still be able to perform all his service; he will not be prevented from giving his attendance at the Ambassador's chapel, notwithstanding he is obliged to contribute to the rates of the parish wherein he has taken a house more than necessary for his own residence. For these reasons I think the defendant is entitled to judgment.

HOLROYD, J.—I am also of opinion that the plaintiff is not entitled to maintain this action. He is a *British-born* subject, and not a person brought hither by the Ambassador in his suite. But it is contended, that although he is a subject of this country, yet not only his person,



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but his goods, to the fullest extent, are protected, because he is employed by the Ambassador in a capacity which, it is said, is that of a domestic servant. Supposing him to be a domestic servant within the meaning of the statute, still I think his privilege does not exist to the extent claimed. The only ground of the privilege is for the sake of the Ambassador, in order that he may not be prejudiced in his dignity, or otherwise, by reason of the person or goods of his servant being subjected to our laws. It is not a privilege granted in any respect whatever on account of the servant, and there is no fact stated in this case to shew, that the debt for which the warrant of distress was granted, arose from his being in the situation of a servant to the Ambassador. Indeed the contrary appears; and nothing is stated to shew that the Ambassador is in any degree injured by those goods being taken, that it will at all interfere with the service of the plaintiff, or will in any respect prevent the fulfilling his duties as a chorister, in as full and ample a manner as if the distress had not been made. The very reason of the privilege therefore ceases, and clearly does not extend to the plaintiff's goods. The Ambassador is in no degree affected either in his dignity, his convenience, or his religion by this proceeding, and consequently these goods are not protected (a).

Postea to the defendant.

(a) *Best*, J., was absent.

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The KING v. The JUSTICES of FLINTSHIRE.

Wednesday,  
April 30.

**UPON** shewing cause against a rule for quashing an order of the *Flintshire* Sessions for assessing and levying a sum of 200*l.* 5*s.* 6*d.* and paying the same into the hands of the treasurer of the county, the case disclosed on affidavits was this:—By an order of Sessions, a former county treasurer was authorized to borrow 1000*l.* for county purposes, on the credit of the county rates. He banked with Messrs. *Sankey* and *Co.*, bankers of *Holywell*, who had from time to time advanced him various sums of money. Being engaged in private speculations of his own, the treasurer became embarrassed in his affairs, and died indebted to Messrs. *Sankey* in a sum of 447*l.* 15*s.* 6*d.* Upon his death they claimed the repayment of this money out of the county rates, as money advanced for county purposes. The question was brought before the Justices in Sessions, who, after inquiring into the circumstances of the case and auditing the accounts, were satisfied that the money so advanced had been *bonâ fide* employed for the benefit of the county, and thought themselves bound in equity to make an order for the repayment of part of it. Accordingly the order above-mentioned was made, and the question now was, whether such an order was valid and binding.

A county treasurer, authorized by an order of Sessions to raise money on the credit of the county rates, obtained advances from time to time from his bankers, and died in their debt. The Sessions being satisfied that the money so advanced had been *bonâ fide* applied to county purposes, made an order for assessing and levying a sum of money towards the repayment of the debt, but this Court quashed the order.

*Scarlett* and *D. F. Jones* shewed cause against the rule for quashing the order, and contended, that it was competent to the Sessions to inquire into and decide upon the justice of Messrs. *Sankeys'* claim, and having accordingly decided that it ought to be discharged, their order was final and conclusive.

*Parke*, contra, was stopped by the Court.

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PER CURIAM.—We are of opinion that the order for raising this money must be quashed. The fact is, that Messrs. *Sankey and Co.*, by consenting to advance this money to the county treasurer, enabled him to pay bills with their money instead of paying them out of the county money, which came into his hands. If they had not advanced that money, the county would have known the extent to which the treasurer was in arrear, and they would have been enabled to call upon him for re-payment, or to make up his accounts; but they enabled him to close the eyes of the county, and lull it into a state of false security. That is the real state of the case; and if we are to do justice between two litigating parties, the order for raising this money must be quashed. He who imprudently trusts another, must take the chances of his improvidence.

Rule absolute for quashing the order(a).

(a) Ante, page 124.

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The KING v. The INHABITANTS of WHITCHURCH.

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A parish apprentice bound for nine years, having served for six, asked his mistress leave to go into another service, to which she consented, saying she was not against it, if he could better himself. He then hired himself as a yearly servant to a master in another parish, and informed his mistress of the fact, to which she said, "Very well, I am not against it." In a few days he went to his new place, and in about a fortnight returned to his mistress for his clothes, who said she hoped he liked his new place, and he said he did:—Held, that this was not such a consent on the part of the mistress as would give the pauper a settlement under the indenture in the parish where the new master resided.

BY an order of two Justices, *Joseph Pierce, Elizabeth* his wife, and their five children, were removed from the parish of *Drayton*, to the parish of *Whitchurch*, both in the county of *Salop*. On appeal the Sessions confirmed the order, subject to the opinion of this Court, upon the following case:—

The pauper, *Joseph Pierce*, by indenture, bearing date

7th *April*, 1798, was bound a parish apprentice till twenty-one years of age, by the appellant parish, to one *Margaret Dutton*, in the same parish, under which he there served her six years, when, the indenture having still three years to run, the pauper not agreeing with *Mrs. Dutton's* foreman, asked his mistress leave to go into another service, to which she consented, saying she was not against it, if he could better himself. He did not mention where he was going. The pauper accordingly went to one *Jenkinson's*, in the parish of *Prees*, and hired himself for a year at 3*l.* 16*s.* wages. He returned and told his mistress, who said, "Very well, I am not against it." In a few days he went to his new place, and in about a fortnight returned to his old mistress for his clothes, who said she hoped he liked his new place, and he said he did. Under these circumstances he lived with *Jenkinson*, in the parish of *Prees*, for three months. The question upon the above facts for the opinion of the Court is, whether there was such a consent given by *Mrs. Dutton* to the service of the pauper with *Jenkinson*, in the parish of *Prees*, as to give him a settlement there by service under the indentures to *Mrs. Dutton*.

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*Nolan*, in support of the order of Sessions. The question raised in this case may be satisfactorily decided upon principle, and does not require the aid of authorities. The rule is, that there must be the full and unequivocal consent of the old master to the service with the new; no knowledge of the fact, and no implied consent will be sufficient. There is no direct consent in this case, and therefore the new service did not confer a settlement. He cited *Rex v. Crediton*(a), and *Rex v. Ashby-de-la-Zouch*(b).

*Gurney*, contra. This case is within both the words and the spirit of several decided cases, in which it has been

(a) 1 East, 58.

(b) 1 B. & A. 116.

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held that such a consent as that given by the mistress to this apprentice is sufficient. It is difficult to distinguish this from an express consent. Here is a general license to quit the first service, a full knowledge when and where the pauper was removing, and a subsequent recognition of all those prior circumstances. No personal conference between the two masters is requisite; the consent of the first, and the adoption of the second, are enough. He cited *Rex v. Shebbear* (a), *Rex v. Bradstone* (b), *Rex v. St. Mary Lambeth* (c), and *Rex v. Holy Trinity, Minorics* (d).

ABBOTT, C. J.—The cases cited in support of the settlement in *Prees* are perfectly distinct in their nature and circumstances from the present. The question is, whether the second service was a service under the indenture. The Sessions have formed an opinion that it was not, though they have not so stated it in express terms, and I think they have come to the correct conclusion. There has been too much of subtlety and refinement introduced of late into this particular branch of settlement law, and it is time that some plain and broad rule should be adopted. There must be an express consent on the part of the first master or mistress, to which the second must be privy, and an employment by the latter, of the servant in the same capacity. What is there to shew that there is a service under the indenture in the parish of *Prees*, with the consent of the mistress, and the privity of the master. The mistress merely does not object to the pauper quitting her service, and the master does not even know that the person he hires is an apprentice, or that he has ever been in any previous employment. The contract he makes with him is not a contract of apprenticeship, but is one of a totally different nature. I am

(a) 1 East, 72.

(b) 2 Bott. 599.

(c) 2 Bott. 595.

(d) 3 T. R. 605.

therefore of opinion that this was not a service with the consent of Mrs. *Dutton*, nor under the indentures, and consequently that no settlement was conferred.

BAYLEY, J.—We should take care not to extend this class of cases of settlement by implication or construction, which we should do if we held that this service conferred a settlement. The service must be under the indenture, with the full consent of the first master, and the full knowledge of the second. Here there is neither the one nor the other, and therefore *Rex v. Ashby-de-la-Zouch* decides this case. The relation between the pauper and Mr. *Jenkinson* was merely that of master and servant, and had no reference to a service by apprenticeship.

HOLROYD, J., concurred.

Order of Sessions confirmed(a).

(a) *Best*, J., was absent.

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Saturday,  
May 3.

BY an order of two Justices, the defendant was, under 7 & 8 Will. 3. c. 6, and 53 Geo. 3. c. 127, directed to pay for the recovery of small tithes, under the value of 40s. [increased to 10l. by 53 Geo. 3. c. 127. s. 4.]; by s. 7, which gives an appeal to the Sessions, the *certiorari* is taken away, “unless the *title* of the tithes should be in question;” and by s. 8, if any person complained against for subtracting tithes, should insist before two Justices, upon any prescription, composition, or *modus decimandi*, agreement or *title*, in order to free himself from the tithes claimed, and deliver the same in writing to the Justices, subscribed by him, and should give the party complaining security, to the satisfaction of the Justices, to pay all costs and damages, as upon a trial at law, to be had for that purpose in any superior court, should be given against him; in case the prescription, &c. should not upon such trial be allowed, in such case the Justices should forbear to give any judgment of the matter, and the party complaining should be at liberty to prosecute him for the subtraction in any Court in which he might have sued before the act. *Quare*, whether by this act the Justices have jurisdiction to try a *modus decimandi*? At all events, where, after summons and appearance, two Justices made an order under this statute upon a defendant to pay the value of certain small tithes, and upon the trial of an appeal against the order, the defendant then, *for the first time*, offered evidence of a *modus decimandi*, which was rejected:—Held, that the Sessions did right, and that if the defendant meant to avail himself of a *modus* as a ground of defence, he was bound to submit his evidence to the two Justices in the first instance.

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By 7 & 8 W. 3.  
c. 6, a sum-  
mary remedy  
is given before  
two Justices

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to *William Warner*, the lessee of the tithes of the parish of *Glemsford*, in the county of *Suffolk*, the sum of 6*l.* for his tithes of milk and calves arising in the said parish, and due to the said *William Warner*, together with his costs and charges. The Sessions on appeal confirmed the order, subject to the opinion of this Court, upon the following case:—

The respondent having proved the notice, summons, and order, and his title as lessee, and that the value of the tithes was of the amount demanded, the appellant claimed to be exempted from the payment of the said tithes, on the ground of a *modus* which covered it, and tendered evidence of the existence of such *modus*, but the Court rejected the evidence, being of opinion that they had no power to try the question. The defendant had not offered any evidence of the *modus* when the case was heard before the Justices by whom the order was made. The question for the opinion of the Court is, whether the Sessions, under the above circumstances, properly rejected the evidence of a *modus*.

*H. Cooper*, in support of the order of Sessions, having intimated that he meant to rely on two points, first, that the Sessions had no jurisdiction to try a *modus*; and, second, supposing they had, yet inasmuch as the defendant had offered no evidence of a *modus* before the Justices, by whom the order was first made, the Sessions exercised a sound discretion in rejecting the evidence, the Court called upon

*Storks*, contra. The question in this case arises upon the construction of 7 & 8 Will. 3. c. 6, which gives a summary jurisdiction to two Justices against persons for not setting out tithes, where the amount claimed does not exceed 40*s.*, which act is extended by 53 Geo. 3. c. 127. s. 4. to cases where the amount claimed does not exceed

107. By sect. 7, of the first act, an appeal is given to the Sessions, to whom power is given to confirm the judgment of the first two Justices, and award costs. The same section declares, that "no proceedings or judgment had or to be had by virtue of this act, shall be removed or superseded by virtue of any writ of *certiorari*, or other writ, out of His Majesty's Courts at *Westminster*, unless the title of the tithes should be in question;" and by sect. 8. it is enacted, "that if any person complained of for subtracting or withholding any small tithes, &c., should, before the Justices to whom such complaint is made, insist upon any prescription, composition, or *modus decimandi*, agreement, or title, whereby he is, or ought to be freed from payment of the tithes claimed, and deliver the same in writing to the Justices, subscribed by him, and should then give to the party complaining reasonable and sufficient security to the satisfaction of the Justices, to pay all such costs and damages, as upon a trial at law, to be had for that purpose in any of His Majesty's Courts, having cognizance of that matter, should be given against him, in case the said prescription, &c. should not upon such trial be allowed; that in that case the Justices should forbear to give any judgment of the matter, and then the person complaining should be at liberty to prosecute him for the subtraction in any other Court, where he might have sued before the making of this act." Now the question is, whether, comparing these two clauses together, the Justices had any right to try the *modus* set up by the defendant. Assuming, for the sake of argument, that a claim of *modus decimandi* might be considered as involving a question of title within the meaning of either of the clauses, there is nothing which absolutely ousts the jurisdiction of the Justices upon such a question. The sect. 7, which gives the appeal, declares that the decision of the Sessions shall be final and conclusive, and

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takes away the *certiorari*. Then all that is done by sect. 8. is to give the party complained against, the option, if he chooses, of submitting the question to a higher tribunal. There is nothing which deprives the Justices of jurisdiction even in questions of title; and unless this construction is put upon sect. 8, the effect of that clause will be completely to neutralize the latter part of the appeal clause, which takes away the *certiorari*, and defeat the policy of the act, which was meant to give parties a cheap and summary mode of deciding claims for small tithes. If then the Justices are not ousted of their right to hear evidence in support of the *modus*, the question, secondly, is, whether the Justices at Sessions acted properly in rejecting the evidence which the defendant tendered. Admitting that the defendant did not offer this evidence, in the first instance, before the two Justices, still he was not precluded from adducing it at Sessions upon the appeal. The defendant was not bound, in the first instance, to put forth the whole strength of his case, but was at liberty to reserve himself for the trial at the Sessions. He was not in the situation of a person against whom an action was brought, who, in the first instance, would be bound to disclose the whole of his case. This was a summary proceeding before two Justices, and he was at liberty to reserve the strength of his case for the appellate jurisdiction. The Sessions therefore were bound to receive the evidence, and at all events they were premature in rejecting it, because there was nothing in sect. 8. to restrain them from determining the question of *modus*. The object of that clause was only to give the party complained against, the privilege, if he chose, of trying the question by a higher tribunal, upon entering into security for costs. Unless the Court therefore are satisfied, first, that a *modus decimandi* is a question of title, and, second, that the Justices have no jurisdiction to

determine that question, this order of Sessions must be quashed. He cited *Rex v. Wakefield* (a).

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*Cooper*, in support of the order of Sessions, urged the objections with which he commenced, and insisted that the Justices who originally heard the case had no jurisdiction to entertain the question of *modus*, and that the Sessions at all events exercised a sound discretion in rejecting on the appeal, evidence, which had not been tendered in the first instance. Upon the first point, he contended, that the ss. 7. and 8. were consistent with each other, and though the word "title" was found alone in the former, yet the *modus decimandi*, being specifically mentioned in the latter as one of the enumerated modes of defence in connection with the word "title," it was obvious that this case came within the scope of that section, and deprived the Justices of jurisdiction upon such a question. Looking to the scope of the statute, it was clear that the Justices were merely to decide the amount of the tithes claimed, and the moment any question of title arose, their jurisdiction was gone. Questions of *modus* were of infinitely more general importance, and required more nice deliberation and learning than a mere question as to who was entitled to the tithes; and therefore there was a stronger reason in this case why the construction, he contended for, should be put upon the statute. But supposing the Court not prepared to pronounce in his favor on this part of the case, the second ground of his argument was unanswerable, namely, that the defendant's evidence was out of time and place; for he should have submitted it, in the first instance, to the Justices by whom the case was first heard, if he meant to avail himself of the *modus* as a ground of defence. Upon this point he cited *Rex v. The Justices of Suffolk*.

(a) 1 Barr. 485.

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*Storks*, in reply, contended, that a *modus decimandi* could not by any construction be considered to mean a question of title, to which alone the restriction as to the jurisdiction of the Justices must be confined, and certainly the importance of such questions was no reason for ousting the jurisdiction, because questions of title required as much knowledge of the law as was requisite in adjudicating a question of *modus*; then, secondly, the appeal was to be considered as an original hearing of the case, when it was competent to the appellant to bring forward fresh matter, although it had not been submitted to the jurisdiction from which the appeal lay. He cited *Rex v. The Commissioners of Appeals in Matters of Excise*(a).

ABBOTT, C. J.—As at present advised, I am strongly inclined to think that a *modus decimandi* is a different matter from a *title* to tithes, and inasmuch as the *title* did not come in question within the meaning of the words of the appeal clause, which takes away the *certiorari*, I think the *certiorari* ought not to have issued; but as that question should rather have been agitated upon a rule to quash the *certiorari* than upon the present rule, which is to quash the order of Sessions, my opinion is not grounded upon that point. I am also strongly inclined to think (but I should take a little further time to consider the subject, if it were necessary to decide the case upon that ground) that the eighth section is compulsory upon the party who means to set up a *modus*, that he shall set it up in the way therein directed. In principle, it is clear that this Act of Parliament was intended only to apply to those cases in which the tithes were actually due, independently of any dispute upon matters of law, either with regard to the person receiving them, or the man-

(a) 3 M. &amp; S. 133.

ner of receiving them. We cannot doubt that that is the principle of the act. The object of it was to give to the owner of the tithes an expeditious mode of recovering them; and it must be obvious, that a cheap and expeditious remedy, in such cases, must be no less beneficial to the tithe owner than to him who is to pay. Every suit for subtraction of tithes, whether in a Court of common law, or a Court having ecclesiastical cognizance, must, in its nature, be very expensive, and of course equally burthensome to him who claims and him who pays. One cannot doubt that it was to remedy this evil that the act was passed, and if the eighth section be not held compulsory upon the party who sets up a *modus*, this consequence will follow, namely, that it will be in his power either to submit the question to, or withdraw it from the jurisdiction of the Justices at his own will and pleasure, and the party claiming will have no option upon the subject. It must come to this, that if the party called upon to pay chooses to say that the Justices shall not try the question, the Justices have no alternative, and cannot proceed; but unless he thinks fit to object to the jurisdiction, the party claiming must submit to the jurisdiction of the Justices, because the words of the seventh clause are obligatory, and none but the Justices shall decide. That being a point however of extensive consequence, I should take more time to consider of it if I were called upon to pronounce a deliberate judgment. Upon the other point made in the case I entertain no doubt whatever. If it was clearly the intention of this party to set up his claim to a *modus*, he should have done so before the two Justices in the first instance. This case differs from almost every other in which an appeal is given. In general, a party claiming to have the decision of Justices in his favor, is bound, in the first instance, to prove his whole case; but in the case of a claim of tithes, all that is requisite to be done in the

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outset, particularly with respect to predial tithes, is to prove that the party was in the occupation of the land in question, and thereby establish a *prima facie* title. But a composition, or *modus decimandi*, is something perfectly distinct from a question of title in the party claiming the tithes; and it seems to me to be exceedingly reasonable, that he who insists upon such a defence, in answer to a *prima facie* case, must do so when the case is first brought before the Magistrates, and that if he forbears so to do, the Justices at Quarter Sessions have a right to exercise their discretion whether they will or will not allow him to do that before them for the first time. If they did not exercise such a discretion, the respondent might be taken by surprise, and the appellant would have an opportunity of walking over the course, by calling witnesses, whose evidence the other side would be utterly unprepared to meet. I think the Justices at Sessions exercised a sound discretion in refusing to receive this evidence; and for that reason I think their order must be confirmed.

BAYLEY, J.—My opinion is founded upon the last point mentioned by the Lord Chief Justice. I think the Justices at Sessions had a right to exercise their discretion upon the question, whether they would or would not enter into the point respecting the *modus*, and I am of opinion they have exercised a most sound discretion in rejecting evidence upon that point. The party here was at liberty to appeal, if he found himself aggrieved by the judgment of the two Justices. The judgment of the two Justices was founded upon all the evidence laid before them. Both parties were before the Justices, each being competent to disclose the whole of his case. The evidence was all on one side, and upon that evidence the decision of the Justices was founded; but the defendant, who after-

wards complained of their judgment, gave no evidence upon the point, with respect to which he attempted to set their judgment aside. It does not appear that before the Sessions commenced, he gave any notice that he meant to insist upon a *modus*, and from the nature of the question there was nothing to indicate to the respondent that he intended to rely upon that ground of defence; but having contented himself with merely going before the Magistrates, and hearing the evidence on the part of the complainant, he then goes before the Sessions, and for the first time offers evidence of a *modus*. I think he was not at liberty to do that. Upon the words of this statute I entertain some degree of doubt, whether the Sessions, after having heard the appellant's evidence in support of a *modus*, would have been at liberty to adjourn the further consideration of the case, because sect. 7. directs, that their decision shall be final and conclusive. But, without saying whether they might do so, in order to give the party making the claim an opportunity of bringing evidence in reply to that which had been offered in support of the *modus*, such a proceeding would of necessity produce a degree of expense greatly beyond the value of the tithes in dispute, and thereby tend to defeat the policy of the act. Upon the other point, I am of opinion, that as the defendant did not make his stand upon a *modus* before the two Justices, and did not give proper notice before the Sessions, that he meant to rely upon that ground, the Sessions exercised a sound discretion in rejecting the evidence, and therefore their order must be confirmed.

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HOLROYD, J., was in the Bail Court during part of the argument, and declined giving any opinion (a).

Order confirmed.

(a) *Best*, J., was absent.

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Wednesday,  
May 7.

## The KING v. CREWE.

By 55 Geo. 3. c. 68. s. 2, the consent in writing for turning a footpath must be under the hand and seal of the owner of the land through which the new path is proposed to be made; therefore where an order of Justices for turning a footpath was founded upon a consent, signed and sealed by the attorney of one of the parties interested, and there being nothing to bind the principal:—Held ill, and quashed by this Court after confirmation by the Sessions. An order made under this stat. cannot be confirmed until the Sessions held next after the expiration of four weeks from the first day on which the notices required by law shall have been published;

therefore, where an order was made for diverting a path, and notice thereof given on the 20th December, and it was confirmed at Sessions on the 17th January:—Held irregular, and quashed.

ON shewing cause against a rule for quashing an order of Justices for diverting and turning a footway, and for quashing an order of Sessions confirming the said order, the case was this:—The statute 55 Geo. 3. c. 68. s. 2, declares, that when it shall appear upon the view of any two or more Justices, that any footway, &c. may be diverted, so as to make the same nearer, or more commodious to the public, and the owner or owners of the lands through which such new footway, so proposed to be made, shall consent thereto by writing under his, her, or their hand and seal, or hands and seals, it shall be lawful by order of such Justices, at some Special Sessions, to divert and turn, and stop up the same; provided that in such case a notice in writing shall be affixed at the place, and by the side of the footway, from whence the same is directed to be turned, and also inserted in one or more newspaper or newspapers published, or generally circulated in the county, where the parish in which such footway shall lie, for three successive weeks after the making of such order; and a like notice shall be affixed to the door of the church or chapel of every parish in which such footway shall lie, on three successive Sundays subsequent to the making of such order; and the said several notices having been so published, the said order shall, at the Quarter Sessions holden within the limit where the footway shall lie, next after the expiration of four weeks, from the first day on which such notice shall have been published, be returned to the Clerk

of the Peace in open court, and lodged with him, and the said order shall, at such Quarter Sessions, be confirmed, &c." The order in question was made on the 20th *December*, 1822, at a Petty Sessions, founded upon a consent in writing, purporting to be under the hands and seals of the owners of the lands through which the new footway was proposed to be carried, but the consent was in fact signed and sealed by the attorney of one of the parties interested, and not by that party himself; and there was nothing to shew that he acted by procuration, or in a representative character. The order having been so made, and the notices thereof required by the act having been given, was confirmed at the next Sessions, which were holden on the 17th *January* last. An affidavit was produced, shewing that the attorney signing and sealing the consent had a power of attorney from his client so to do, but that instrument had not been enrolled at the Sessions. The questions were, first, whether the original order was valid and binding, having been founded upon a consent signed and sealed by the attorney only of one of the parties interested; and second, whether the order of Sessions confirming such order, was valid, having been made before the expiration of four weeks from the first day on which the notices for diverting the footway had been published.

*Scarlett, F. Pollock*, and *Sir Gregory Lewin*, shewed cause against the rule; and *Puller*, *contra*, was stopped by the Court.

**PER CURIAM.**—We are of opinion that both the orders must be quashed. As to the original order for diverting the footway, we think that the consent should have been signed and sealed by the parties personally interested, or by a person who appeared to be duly authorized, to

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bind them. Here the consent is signed and sealed by an attorney, with his own name and seal, and there is nothing to shew that those acts were done for and on behalf of his principal. It is true, that the principal has now made an affidavit of his having executed a power of attorney, authorizing his attorney to act for him, but that instrument not having been enrolled at the Quarter Sessions, there is nothing to give validity to the order. The public are to look to the records of the Quarter Sessions for authentic evidence that all the requisites of the Act of Parliament have been complied with. The act requires that the consent shall be under the hand and seal of the party over whose lands the path is to pass, and when that requisite has been complied with, the public are effectually secured in the enjoyment of the new footway; but if there is nothing but the signature and seal of the person who happens to be the solicitor or attorney of the party really interested, and he executes in his own name, and not in the name of the principal, the public have not that security which the Legislature intended should be given; and there being nothing before us to supply this defect, it is quite clear that the original order for diverting this way is bad. But supposing the original order to be valid, still, the proper steps have not been taken to render it binding. The statute requires three distinct species of notice: first, a notice at the place whence the footway is directed to be turned; second, a notice in the newspapers; and third, a notice at the church door; and then it requires that such notices having been so published, the order for the purpose of confirmation, shall be returned to the Clerk of the Peace at the Quarter Sessions holden next after the expiration of four weeks from the first day on which such notices shall have been published. Now, here the order is made on the 20th *December*, and it is confirmed at the Sessions held on the 17th

*January* following; consequently four weeks have not expired from the first notice of the order to its confirmation. It is a matter of great importance that full effect should be given to every one of the provisions contained in the 2d section of this Act of Parliament, and there having been this material omission, it appears to us that the order of Sessions as well as the original order must be quashed.

Rule absolute.

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The KING v. The INHABITANTS of BERKSWELL.

Friday,  
May 9.

**T**WO Justices, by their order removed *John Matthews*, from *Berkswell* in the county of *Warwick*, to *Holy Trinity* in the city of *Coventry*, and upon appeal the Sessions quashed the order, subject to the opinion of this Court, on the following case:—

Previous to the residence in *Berkswell*, hereinafter mentioned, the pauper was settled in *Holy Trinity*. In 1808, under the provisions of an Inclosure Act, a lease for thirty-one years was granted by the lady of the manor, to one *Thomas Hands*, of a cottage, situate in *Berkswell*, at the annual rent of one shilling. *Hands* was residing in the cottage at the time of the lease, and continued to do so afterwards for upwards of a year, when he died intestate, leaving a widow and three daughters, one of whom was married to the pauper. Letters of administration were granted to the widow, but no distribution made of the intestate's effects. After the death of *Hands*,

An intestate dies seised of a leasehold cottage, leaving his wife and three daughters him surviving. The wife obtains letters of administration, but makes no distribution of her husband's effects. The husband of one of the daughters is, with permission of the administratrix, let into possession of the cottage, and he and his wife reside therein for some years, until they become chargeable to the pa-

rish, without paying any rent, which during that time was paid by the administratrix : —Held, that the pauper had not such an estate in the premises that a Court of Equity would have decreed a conveyance, and clothed him with the legal title, so as to confer a settlement by an irremovable residence of forty days.

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his widow lived in the cottage for about two years, and upwards; one of the other daughters with her husband resided there, for two or three years more, and then the pauper and his wife came and resided there for some years, and until the period of their removal, with the permission of the widow, she occasionally helping them, and always paying the annual rent of one shilling reserved by the lease. The pauper never paid any rent, either to the widow or the lady of the manor. The question was, whether by such residence the pauper gained a settlement in the parish of *Berkswell*. The Sessions, subject to the opinion of this Court, thought that he did, and quashed the order.

Scarlett and *Reader*, in support of the order of Sessions, contended, that the pauper had such an equitable estate in the premises in question, that a Court of Equity would have decreed a conveyance, and clothed him with the legal title, and therefore his residence for forty days gained him a settlement, upon the principle that a man cannot be removed from his own estate. It might be true that the widow of *Hands*, upon his death, had the legal estate vested in her, but still it must be considered as subject to the Statute of Distributions, 22 & 23 *Car. 2.* c. 10, under which she would have only a right to one-third, the remaining two-thirds being vested in her daughters, one of whom the pauper married. He therefore had an equitable interest, and a Court of Equity would have decreed a conveyance, and clothed him with a legal title. Upon this principle he was irremovable for forty days, and therefore gained a settlement. They cited *Rex v. Natland(a)*, as an authority in point. In that case one of several persons entitled to a distributive share under a bequest in a will of property, (thereby expressly

(a) Burr. S. C. 793.

devised to be sold, and the proceeds divided,) having resided before, he was considered irremovable during that time, and consequently gained a settlement. There was no sound distinction between that case and the present, and as the pauper had an equitable interest in this property, it followed that he was settled in *Berkswell*.

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*Nolan*, (with whom were *Holbech* and *Goulburn*,) contra. The pauper's residence was under a mere parol license to occupy, and he had not such an equitable estate, that a Court of Equity would have decreed a conveyance, and clothed him with a legal title. Here *Hands'* widow being administratrix had the legal interest in the premises, and she alone could gain a settlement, and not any person who might be beneficially interested in the distribution of the intestate's estate by force of the statute. The point decided in *Rex v. Natland*, was merely, that the opinion of a Judge of assize, is final on a case referred to him by consent of the parties, but the Court did not go into the question upon which the opinion of the single Judge was given. *Rex v. Standon*(a), clearly recognizes the principle upon which this case is to be decided, where Lord *Ellenborough* draws a distinction between a legal or equitable estate, and a mere license by parol to occupy; and *Le Blanc*, J., held, that a man must have such an equitable estate, as would be perfected in him by the intervention of a Court of Equity to enable him to gain a settlement. In *Rex v. Widsor*(b), which case is recognized in *Rex v. Cold Ashton*(c), and *Rex v. North Curry*(d), it was held, that one of several, entitled in distribution, and not the administrator, by a residence of forty days upon part of

(a) 2 M. & S. 467.

(b) Burr. S. C. 109.

(c) Burr. S. C. 444.

(d) Cald. 137.

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the intestate's estate, did not acquire a settlement. Although in *Rex v. Horsley*(a), it was decided, that a sole next of kin, residing, gained a settlement, Lord *Ellenborough* drew the distinction, that she was at any time entitled to be clothed with the legal title, yet that it would be different, where several were equally entitled. The present case is distinguishable from *Rex v. Offchurch*(b), and *Rex v. Holm East Waver*(c), because in those cases the *cestui que* trusts, resided, with permission of the trustees. So is this case distinguishable from *Rex v. Wivelingham*(d), because there the *cestui que* trusts under a will, took a conveyance of the estate (directed by the will to be sold, and the proceeds divided between the pauper and three others,) and the pauper having afterwards resided, there was no doubt he thereby gained a settlement; but here the pauper's residence was merely under a parol license, and a Court of Equity could not have given him any legal title.

ABBOTT, C. J.—I am clearly of opinion there was not an equitable interest in this case, which would have entitled the pauper to say to the administratrix, “I shall come and live in this place, and if you do not allow me so to do, a Court of Equity will enforce my title.” The pauper had no such right. He was entitled indeed, in right of his wife, to call upon the administratrix to give an account of the estate and effects of the intestate, but it might have turned out that she had paid much more than the value of this tenement in discharging her husband's debts, and in that case he would have had nothing.

BAYLEY, J.—In *Rex v. Toddington*(e), which is the latest case upon this head of settlement, the beginning

(a) 8 East, 405.

(b) 2 Const. 500.

(c) 16 East, 127.

(d) Doug. 738. 741.

(e) 1 B. & A. 560.

of Lord *Ellenborough*'s opinion is, I think, decisive upon this subject. His Lordship says, "This is not an estate so clearly equitable, that a Court of Law can presume that a Court of Equity would, if applied to, clothe the party with the legal right to it." That paragraph shews in what case an equitable interest shall give the party a right to be considered as gaining a settlement in right of it; and my Brother *Holroyd*, in giving his judgment in that case, says, "An equitable estate is very different from an equitable right to have a conveyance of the legal estate." In this case it seems to me, that the pauper had no right at all to go into a Court of Equity to have a specific portion of this estate decreed to him, or to be admitted to reside upon the premises.

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HOLROYD, J.—I am of opinion that the pauper, in this case, had not any equitable right to enjoy the property in question. He was entitled to his wife's share, assuming that the testator's effects were sufficient to pay it, but I think he had no right to enter and take possession of the cottage without the assent of the administratrix, nor even then, if she disposed of the possession, without reserving the powers given to the ordinary, under the Statute of Distributions(a).

Rule absolute for quashing the  
 Order of Sessions.

(a) *Best*, J., was absent.

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Friday,  
May 9.The KING v. The INHABITANTS of CHERRY  
WILLINGHAM.

A pauper was hired as ground-keeper and his master agreed to give him 20*l.* a-year wages, a cottage to live in, and the joist and whole profits of one cow, for his own services, and the sum of 28*l.* and the joist and whole profits of another cow, in consideration of his lodging and maintaining in the cottage two of his master's labourers. The contract being entire, and the annual value of the lands on which the two cows were depastured being more than 10*l.*; Held, that he gained a settlement by renting a tenement within the meaning of the statute.

BY an order of two Justices, *William Boulding* and his wife and children, were removed from the parish of *Hougham* in the parts of *Kesteven*, to the parish of *Cherry Willingham*, both in the county of *Lincoln*. The Sessions, on appeal, confirmed the order, subject to the opinion of the Court, upon the following case:—

Previous to the 1st *May*, 1817, the pauper, *Matthew Boulding*, had gained a settlement by hiring and service in the parish of *Cherry Willingham*, and on that day contracted to become the ground-keeper of *John Hill*, in respect of his farm at *Hougham*, on the following terms: His master was to find a cottage on the farm for the pauper to reside in, with his wife and family, to give 20*l.* wages, and to depasture for the pauper two cows upon the farm at *Hougham*; the whole profits of which cows were to be taken by the pauper (as hereafter explained), who, in consideration thereof, and of 28*l. per annum*, to be paid to him by the master, in addition to the above wages of 20*l.*, was to maintain two servants in the cottage wherein pauper and his wife and family resided during the said year. The pauper resided under these terms in *Hougham* during the year, taking the whole profits of the cows, receiving his wages, the allowance of 28*l.*, and maintaining the two servants. The contract was an entire contract. The master agreed to give the pauper 20*l.* a year, a cottage to live in, and the joist and whole profits of one cow, for his own services, and the sum of 28*l.* and the joist and whole profits of another cow, in consideration of his (the pauper's) lodging and maintaining in the cottage two of his (*Hill's*) labourers. The annual

value of the lands on which the two cows were depastured exceeded 10*l.*, but would not be of that value if one cow only had been kept; that is to say, the annual value of the agistment of two cows upon the land in question would be worth 10*l.*, but if one cow not worth 10*l.* a year.

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The case was argued on a former day, when

*S. M. Phillips*, in support of the order of Sessions, contended, first, that it was apparent upon the face of the case, that the pauper had no interest whatever in one of the cows, and consequently the value of the tenement, even if this could be considered as a tenement, was insufficient to confer a settlement. It was quite clear that the produce and profit of one of the cows was expressly applied to, and received by the other two servants of the pauper's master, and in no degree concerned the pauper himself. The profit indeed passed through his hands, but that was merely for the convenience and on account of his master, and not with any view to his own personal participation or benefit. But secondly, this was no tenement within the meaning of the statute 13 & 14 *Car. 2. c. 12.* It was very distinct in its nature and character from all the cases of this kind, and the Court would not strain either the law or common sense, in order to extend the principle of those cases, the operation of which had been already more than sufficiently extensive.

*Scarlett and Bulguy*, *contra*. There is a sufficient renting of a tenement to confer a settlement upon this pauper, both as respects the nature and the value of the tenement in question. There is one entire contract here between the parties. The pauper is to be ground-keeper



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to Mr. *Hill*, and is to discharge the duties of that situation, and to maintain two other of his master's labourers; and in payment, he is to receive a house to live in, the profits of two cows, and so much yearly wages. How can it be contended, that this is not taking a tenement within the meaning of the statute? He has the depasturing of the cows *in propria jure*. It has been held, that the renting a dairy, or the renting a rabbit-warren, is a good tenement, and will confer a settlement, *Rex v. Piddletrent-hide*(a); that a cattle-gate is a tenement within the meaning of the statute, *Rex v. Whirley*(b); and that occupation, in reward of service as a herdsman upon a common, was a good renting of a tenement, *Rex v. Melkridge*(c); all which are much slighter cases, and much more equivocal in their nature than the present; and therefore, upon all these authorities, the tenement here is quite sufficient in its nature. Then, as respects the value, the case is equally clear in favor of the settlement. There is no distinction between the one cow and the other, as to the terms upon which they were taken by the pauper, or the manner in which the produce of them was to be applied. He was to receive the produce of both, arising in *loco certo*, and to apply it as he thought fit. There was no special application of any part to the maintenance of the labourers; and the pauper had precisely the same interest in the land in respect of one of the cows as he had in respect of the other. By the very finding of the case, therefore, the value is more than sufficient. If any authority were wanting upon this point, *Rex v. Minster*(d) is precisely in point, and is conclusive of the present case (e).

(a) 3 T. R. 772.

(b) 1 T. R. 137.

(c) Id. 598.

(d) 3 M. &amp; S. 276.

(e) Vide *Rex v. Sutton St. Edmunds*, 2 Dowl. & Ry. T. R. 800, and *Rex v. Tisbury*, 2 Nol. P. L. 17. 3d edit.

The Court took time to consider of the case, and judgment was now delivered by

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ABBOTT, C. J.—We have considered of this case, and we are all of opinion that the pauper has acquired a settlement in the parish of *Hougham*, and therefore that the order of removal was wrong, and the rule for quashing it must be made absolute. The tenement in question consisted in the depasturing of two cows. The case found that the annual value of the land upon which the cows were depastured would have been under 10*l.*, if only one of the cows was kept upon it, but that it exceeded that sum if both cows were so kept. It was therefore contended in support of this order, that though the depasturing of one of the cows might be considered as a tenement, yet that that of the other could not. Now it is found, that the contract between the parties was one entire contract. The master agreed to give the pauper 20*l.* a year, a cottage to live in, and the joist and whole profits of one cow, for his own services; and 28*l.* a year, and the joist and whole profits of another cow, in consideration of his lodging and maintaining in his cottage two of his master's labourers. The question to be determined arises in relation to the latter cow. By the terms of the contract, the master is to have no part of the produce of either of the cows, and that produce therefore must have formed a part of the value which was to be given to the pauper in consideration of his services, and whether the pauper was to be paid in money, or in any other manner beneficial to himself, is perfectly immaterial. We therefore think, that the difference, as to the depasturing of these two cows, as collected from the terms of the contract, does not amount to any legal distinction, and we cannot therefore say, that the agistment

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of the latter cow was not a tenement within the meaning of the statute.

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Rule absolute, for quashing the Order of Sessions.

Friday,  
May 9.


The KING v. The INHABITANTS of HAGWORTH-  
INGHAM.

The lord of a manor gave G. a license in writing to build a house on the waste, which he built accordingly, and sold it to B., who again sold it to T. for 30*l.* T. occupied the house for five years, and paid annually one shilling to the lord, and then re-sold it for 34*l.* :—  
Held, that T. did not purchase such an estate or interest, either legal or equitable, as to gain a settlement by virtue of 9 Geo. 1. c. 7. s. 5.

BY an order of two Justices, *Edward Turner* and *Jane* his wife, and their children, were removed from *Stainton by Langworth* to *Hagworthingham*, both in the county of *Lincoln*. The Sessions on appeal confirmed the order, subject to the opinion of this Court, upon the following case :—

In the year 1798, certain Commissioners, in pursuance of an Act of Parliament for the inclosure of the parish of *Hagworthingham*, made their award, and allotted the Earl of *Manvers*, as lord of the manor of *Hagworthingham*, an allotment as a full compensation for his right and interest in or to the soil of the open fields and commonable and waste lands within the said manor of *Hagworthingham*. In the year 1809, one *Thomas Goodwin* applied to Lord *Manvers*, through Mr. *De Brun*, his Lordship's agent, for leave to build a house upon the waste in the parish of *Hagworthingham*. Lord *Manvers* gave him in writing, full and free liberty to build a house on the place in question. *Goodwin* built there, on the waste by the road side, in the same year, a blacksmith's shop, which, two years afterwards, he sold to one *Bailey*, who sold it soon afterwards to the pauper for 30*l.* No deed of conveyance was executed to the pauper. The pauper converted the shop into a dwelling-house, where

he resided during five years, and then sold it to one *Wright* for 34*l.* The pauper continued to live therein, as tenant to *Wright*, for two years longer. During the five years that the pauper resided as owner of the house, he paid one shilling a year to Lord *Manvers*, as lord of the manor. The surveyor of the highways once demanded this one shilling to be paid to him, but it never was so paid. On the pauper quitting the house, *Wright* went to live there, and it is let by *Wright* to a tenant for 2*l.* 10*s.* a year at the present time.

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The case was argued on a former day, by

*Nolan* and *Patterson*, who, in support of the order of Sessions, contended, that the pauper was the purchaser of an interest either legal or equitable for 30*l.* in the parish of *Hagworthingham*, and thereby gained a settlement, within the meaning of 9 Geo. 1. c. 7. s. 5. They cited *Rex v. Butterson*(a), *Rex v. Calow*(b), *Rex v. Garway*(c), *Rex v. St. Mary, Whitechapel*(d), and *Rex v. Hornchurch*(e).

*Balguy* and *Clinton*, contra. The pauper had no better title than *Goodwin*, and if the latter had no legal or equitable estate in the parish, no settlement was gained. Originally *Goodwin* had no more than a permissive occupation, or license to build. He had no interest in the land, and therefore he could convey nothing to a purchaser. The pauper's title depends entirely upon the interest which *Goodwin* had, and as the latter had nothing but a bare naked possession, without title, no settlement could be gained by the pauper's purchase. They relied

(a) 6 T. R. 554.

(b) 3 M. & S.

(c) Burr. S. C. 632.

(d) Burr. S. C. 55.

(e) 2 B. & A. 189.

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upon *Rex v. Horndon-on-the-Hill*(a), as being expressly in point.

The Court took time to consider the case, and

ABBOTT, C. J., now gave judgment.—We have considered of this case, and are of opinion, that the pauper did not gain a settlement in the parish of *Hagworth-ingham*, and consequently the rule for quashing the order of Sessions must be made absolute. It was contended in argument, that when a party has an estate in a parish for which he has paid an actual consideration of 30*l.* his occupation of that estate enables him to acquire a settlement; and there was some discussion as to the nature of the estate by the purchase of which a settlement could be thus acquired. But on the authority of *Rex v. Horndon-on-the-Hill*, we are of opinion, that no estate or interest in the land was purchased by the pauper in this case. It appears upon the statement of the facts sent us by the Sessions, that the pauper, after his purchase, paid one shilling *per annum* to Lord *Manvers*, as lord of the manor, during his occupation; but it does not appear that any such payment was made by the person who originally erected the building upon the waste; and therefore, though the pauper *may* possibly have acquired the character of tenant from year to year to Lord *Manvers*, he is still without any interest in the land derived either from *Bailey* or *Goodwin*, his predecessors, because their erection and occupation of the house under a license from the lord, does not amount to any legal estate whatever. We think the present case is precisely similar to that of *Rex v. Horndon-on-the-Hill*, and must be governed in principle by it; and that case clearly decided, that a mere license to build on the waste does not convey a grant of any estate in the soil, legal or

(a) 4 M. & S. 562.

equitable. The observations of Lord *Ellenborough* in that case are very decisive. He says, "We cannot take into our consideration what it may be conjectured a Court of Equity would determine in this case. Perhaps a Court of Equity might interfere, but can we say with certainty that it would? We ought to see that the party has clearly an equitable interest, and not merely such a claim as might possibly induce a Court of Equity to interpose in some way or other. This was a mere personal license. The pauper here never had a more perfect estate than the license gave him, that is, a permission to occupy." Upon this authority, therefore, and upon the ground that there was no purchase in this case of any estate or interest in the land or the building, we are of opinion that no settlement was acquired by the pauper.

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The KING  
v.  
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INGHAM.

Rule absolute for quashing the Order of Sessions.

**The KING v. The COMPANY OF PROPRIETORS of the  
MANCHESTER and SALFORD WATER WORKS.**

**T**HIS was an appeal against a rate made by the Commissioners of Police of *Manchester* and *Salford*, upon certain water pipes, trunks, and other apparatus of the defendants, used by them for supplying these towns with water. The Sessions on appeal confirmed the rate, subject to the opinion of the Court, upon the following case :

The defendants are a body corporate and politic, and

brew-houses, and other buildings, gardens, garden-ground, and other tenements within the same towns, are liable to be rated for the purposes of the act. Under this act the *Manchester* and *Salford* Water Works Company are not rateable as occupiers of a tenement, in respect of their water pipes carried under ground, for supplying those towns with water.

By the *Manchester* and *Salford* Paving and Lighting Act, 32 Geo. 3. the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses,

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by stat. 49 Geo. 3. c. 192. s. 32. are empowered to make and maintain the necessary works and apparatus for supplying the towns of *Manchester* and *Salford* with water. They have an office and yard in the town of *Manchester*, which they rent from the owners thereof; and they have also main pipes running through many of the streets of *Manchester*, from which service pipes convey the water to the several dwelling-houses of the persons whom they supply. By sect. 55 of the same statute, inhabitants wishing to have water from the defendants' works, are authorized, with the consent of the defendants, and with the consent of the owners of the premises through which the pipes shall pass, at their own expense, to open the ground between the main pipes and their houses, and to lay down pipes communicating from one to the other, upon payment of certain yearly rates to be agreed on. And in default of payment thereof, the defendants are authorized to remove the pipes, and to recover the arrears by distress and sale, the pipes to be restored to the persons who originally provided them. By stat. 2 Geo. 4. the defendants are compelled to furnish a sufficient supply of water, in the manner directed by the former acts, to every inhabitant occupying a private dwelling-house, or a part thereof, in any part of the said towns, for the use of his family, at certain annual rates therein specified, and varying in proportion to the rent of the houses of the inhabitants, 10*l. per annum* being the *maximum*, and 12*s. per annum* the *minimum* of such rates; and when water is supplied for any other purpose than the consumption of private families, a further rate to be paid according to agreement between the parties. In practice, the service pipes are sometimes put in by the company's plumber, and sometimes by the persons who receive the water. Sometimes the tenant bears the expense of the service pipes from the main pipe to his premises, and

sometimes the Company pay it for him, and charge him a per centage in addition to his water rate; but the tenant always bears the expense of the pipe within his own premises. The Company have stop cocks in the different streets, to regulate the direction of the water, and in case the consumers do not pay their water rate, the Company may, and sometimes do, withdraw the supply, by cutting off the service pipes. By 32 Geo. 3. (An Act for cleansing, lighting, and watching the streets of *Manchester* and *Salford*) certain Commissioners are (by sect. 39,) authorised once in every year to ascertain the sums to be raised by rates or assessments upon the inhabitants, "and to raise such sums by rates or assessments upon all the tenants or occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses, and other buildings, gardens, garden-ground, and other tenements, situate, standing, lying, and being within the said towns respectively, according to the annual rent or value of the same respectively." In pursuance of this clause, the Company were duly rated in respect of their office and yard in *Manchester*, in which assessment they have acquiesced; they were also further rated "in respect of your pipes, trunks, apparatus, works, and tenements in the township of *Manchester*, for and concerning the conveyance and supply of water in that township, and the profits arising therefrom in the same township, 33*l.* 15*s.*" The Company have no property in the township of *Manchester*, except that specified in the assessment: their reservoirs, engines, and engine-houses being in the township of *Beswick*. Against this latter assessment the Company appealed. The Sessions were of opinion, that the defendants were, under the above circumstances, to be considered as beneficial occupiers of the pipes, &c. mentioned in the assessment, and confirmed the rate.

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This case was argued before *Bayley, J. Holroyd, J. and Best, J.*, at the Sittings held at *Westminster* after last *Hilary Term*.

*J. Williams, Starkie, Armstrong, and Courtenay*, argued in support of the order of Sessions, and cited *Rex v. The Rochdale Water Works*(a), *Rex v. Macdonald*(b), *Rex v. Nicholson* (c), *Rex v. Bell* (d), and *Rex v. Jolliffe*(e).

*Coltman* argued contrà, and cited 2 *Rol. Ab.* 57. l. 7. 12. *Com. Dig.* tit. *Tenement*, E. 2. *Rex v. Bell. Rex v. Jolliffe. Hollis v. Goldfinch* (f). *The Duke of Newcastle v. Clark* (g). *Atkins v. Davis* (h). *Stanley v. White* (i), and *Rex v. Bath* (k).

*The Court* took time to consider the case, and the judgment was now delivered by

**BAYLEY, J.**—The question raised for the opinion of the Court in this case was, whether the Company, in respect of their pipes, trunks, and other apparatus for supplying the towns of *Manchester* and *Salford* with water, were liable to the payment of rates, under the 49 *Geo. 3.* as the occupiers of the water-way; or, in other words, whether their occupation of that water-way was to be deemed a tenement within the meaning of that act. By the 39th section of that act, “the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses, and

(a) 1 M. & S. 634.  
 (b) 12 East, 324.  
 (c) Id. 330.  
 (d) 7 T. R. 598.  
 (e) 2 T. R. 90.

(f) 2 Dow. & Ry. T. R. 316.  
 (g) 2 J. B. Moore, 666.  
 (h) Cald. 315.  
 (i) 14 East, 332.  
 (k) Id. 609.

other buildings, gardens, garden-ground, and other tenements," are made liable to be rated. It does not adopt the language of the 43 *Eliz.* c. 2, "land and houses," but it confines itself to the various kinds of property which I have specified; the word "land" is no where to be found, but the word "tenement" is used; and therefore the decisions upon the statute of *Elizabeth* will not apply to the present case, unless the word "tenement" here used, is to be construed as equivalent to, or comprehended in, the word "land." This is an act "For cleansing, lighting, watching, and regulating the streets, lanes, passages and places within the towns of *Manchester* and *Salford*, and for widening and rendering more commodious, several of the said streets," &c. One of the chief objects of the act, therefore, was clearly to provide for the proper security, peace, and accommodation of persons dwelling in and passing along these towns, and the rate is to be made upon those persons, namely, upon "the tenants or occupiers of any messuage," &c. there situate. It is observable, that wherever the word "tenement" occurs in the act, it is invariably associated with some other term denoting a *building* of some kind or other. In the 39th section, which directs the Commissioners to ascertain the sums to be raised by rates or assessments, and enumerates and describes the persons upon whom these rates are to be made, the word "tenement" occurs; but in what connexion? "Other buildings, gardens, or garden-ground, and other tenements." By the 40th section, the demand of the rate is to be left at "the dwelling-house or tenement" occupied by the person rated. The 41st section recites, that "several messuages, dwelling-houses, &c. in the town, are let out in lodgings and tenements to different tenants," and provides, that "every such messuage and dwelling-house, or tenement," shall be liable to a rate. These are the principal

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instances in which the word "tenement" is used in the course of the act, and from these instances, considering the manifest object of the act, and the association in which we find this word, we are to consider in what sense the Legislature intended to use it, and how it ought properly to be applied. The constant omission of the general and obvious word "land," and the introduction of the terms "gardens or garden-ground," clearly imply that *land in general* was not intended to be made the subject of the rate. The object of the act was to give protection and security to the inhabitants in their persons and their property; and therefore houses, and any species of property appertaining to residency and to trade, are carefully enumerated, and are reasonably made the subjects of the rate, because they partake of the benefit afforded. But why were gardens and garden-ground to be included, if land in general was not? For this very sensible reason: garden-grounds in the immediate vicinity of a large and populous town are an extremely valuable species of property, and are also extremely open to depredation and injury, and the improvement in lighting and watching these towns would be the means of affording very important protection to property of that nature in their neighbourhood, and would therefore properly render such property the subject of charge. Gardens and garden-grounds, therefore, with reference to this Act of Parliament, are properly distinguishable from land; while land in general, and particularly pasture land, and other species of real property, such as are included under that general denomination, are as properly comprehended in the statute of *Elizabeth*, as affording large incomes to the proprietors, and consequently supplying the means of contribution towards the public expenditure. But these latter kinds of landed property are omitted in this Act of Parliament, because they can derive no important protection or equi-

valent advantage from the improvements which it is the object of the act to effect. We are therefore of opinion, that the word "tenement," as used in this statute, is not equivalent to the word "land" in the statute of *Elizabeth*, and that the property in question is not a "tenement" within the plain and fair meaning of the Legislature in this statute, and consequently is not liable to the payment of this rate. For these reasons we think that the order of Sessions confirming the rate upon the defendants, must be quashed.

Order of Sessions quashed.

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The KING v. The JUSTICES of the HUNDRED of  
CASHIOBURY.

**BROUGHAM** moved for a *certiorari* to remove a conviction under the stat. 5 *Anne*, for killing game, for the purpose of having it quashed for insufficiency, there being no appeal given by the statute to the Sessions. He admitted that the objection was not apparent upon the face of the conviction, but arose upon the form of the information. Upon which

A *certiorari* always lies to remove proceedings under penal statutes, unless it is expressly taken away; and an appeal never lies unless it is expressly given by the statute

The COURT said, on the authority of *Rex v. Liston* (a), that unless the objection appeared on the face of the conviction itself, no notice could be taken of it. And referring generally to penal statutes, they observed that this was the governing principle with respect to the writ of *certiorari*, and the right of appealing to the Sessions, namely, that the *certiorari* always lies, unless it is expressly taken away, and an appeal never lies, unless

This Court will not take notice of any formal defect in the proceedings under a penal statute, unless it appears on the face of the conviction itself.

(a) 5 T. R. 338.

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of CASHIO-  
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it is expressly given by the statute; and inasmuch as the statute 5 *Anne*, c. 14. does not give an appeal in terms, there is no mode of re-considering the adjudication of the Justices, but by removing the proceedings by *certiorari*, but with this restriction, that no objection can be taken unless it appears upon the face of the conviction itself, and not upon any collateral proceeding. The Court added, that if there was any substantial ground for complaint, it was still open to the party to seek redress by a motion for a criminal information.

Rule discharged.



The KING v. CASSON and Others.

The statute 13 G. 3. c. 78. s. 80, prohibits the removal by *certiorari* into this Court of any proceedings had in pursuance of that act. Where an order was made by two Justices, and confirmed by the Sessions, for diverting a road, professedly under the authority of, but (as was alleged) without pursuing all the formalities required

AN order of Sessions having been made confirming an order of two Justices for diverting and turning a certain highway in the county of *Merioneth*, the proceedings were, at the instance of the defendants, returned by *certiorari* into this Court, for the purpose of having them quashed for insufficiency. After the proceedings had been so removed, the prosecutors obtained a rule, calling on the defendants to shew cause, why the said writ of *certiorari* should not be quashed *quia improvide emanavit*, and a writ of *procedendo* awarded. On shewing cause against this latter rule, and a peremptory rule for quashing the orders for diverting and turning the road in question, two points were raised; first, whether the order for diverting the road was a proceeding in pursu-

by the act:—Held, that the *certiorari* was still taken away; and after the proceedings had been in fact removed, the Court quashed the *certiorari*, *quia improvide emanavit*, and refused to discuss the sufficiency or insufficiency of the order.

*Quære*, whether an order for diverting and turning an old road, need set out the names of the owners of the land through which the new road is proposed to be carried.

ance of 13 *Geo. 3.* c. 78, and, second, whether, assuming it not to be such a proceeding, a *certiorari* would lie at common law. On the face of the proceedings returned under the *certiorari*, the order of the two Justices for diverting and turning the old road in question, after describing the old road, according to a plan annexed thereto, and pointing out a more convenient course, also described in the plan (but without naming the owners of the lands through which the new road was proposed to be carried) proceeded to order as follows: "We do hereby order, that the said highway be directed and turned through the lands, and according to the line marked A. in the plan hereunto annexed, and that the surveyors of the highways for the said parish of *Festiniog*, where the old road lies, do forthwith proceed to treat and make agreements for the recompense to be made for the said ground, and for the forming the said new road, and for the making such fences and ditches as shall be necessary, in such manner, with such approbation, and by pursuing such measures and directions, in all respects, as are warranted and prescribed by the statute made in the 13th year of the reign of his Majesty King *Geo. 3.* for the amendment and preservation of the highways, and every subsequent act or acts relating thereto; and we do order an equal assessment not exceeding the rate of sixpence in the pound to be made, &c. upon all and every the occupiers of lands, &c. in the said parish, and that the money arising therefrom be paid and applied in making such recompense and satisfaction as aforesaid, pursuant to the directions of the said acts, &c."

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*W. E. Taunton* and *R. V. Richards*, for the defendants. First; the order made in this case, though it purports to be a proceeding in pursuance of the 13 *Geo. 3.* c. 78. s. 19. is not so in fact, and therefore the *certiorari*

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is not taken away by s. 80, but lies at common law. Second; supposing, however, the *certiorari* to have issued improvidently, still, the objection should have been made on shewing cause against the rule *nisi* for the writ, and consequently the prosecutors are now concluded, and the Court are bound to entertain the objections for 'insufficiency appearing on the face of the proceedings returned from the Sessions. The first question is, whether this be a proceeding in pursuance of this act, for if it be not, the *certiorari* is not taken away. It clearly is not a proceeding under the statute, inasmuch as the statute requires that the names of the owners of the lands through which the new road is to be carried shall be set forth in the order. For this purpose a blank is left in the form of order given in the schedule at the end of the statute. Now this order does not pursue this direction, for it omits the names of the owners of the lands and grounds through which the new road is to be carried. It is true, it describes the situation of the place through which the road is to go, and it also directs the surveyor to treat with the owners of the lands and grounds for a compensation; but this is not sufficient, because in each case the names of the owners should be inserted, and for this obvious reason, namely, that the surveyor and the owners may come to an agreement for the recompense to be made, in order that the Justices may make an assessment upon the rest of the parties interested. This is an absolute order made for an assessment, whereas the statute only authorises the Justices to make a conditional order, and consequently this cannot be treated as a proceeding under this statute. If this be so, then the *certiorari* is not taken away, but will lie at common law. The defendants are not bound to shew upon what statute the order is founded; the *onus probandi* lies on the prosecutors. It is sufficient for the

present argument that it is not a proceeding under the statute in question; and if it be not, then the order must be quashed for insufficiency. In *Rex v. Crewe* (a), decided the other day, the Court quashed the order, on the ground that it was not conformable to the statute, and was null and void. For any thing that appears, this may be an order under 55 Geo. 3. c. 68. s. 2, and if so, it is by force of that statute removable into this Court, and must be quashed for insufficiency. But supposing this Court will treat it as a proceeding under 13 Geo. 3. still, they will not now entertain a cross motion to quash the *certiorari*, supposing it to have improperly issued. The usual course in these cases is to move for a *certiorari* in the first instance, but with a view to give the other side an opportunity of shewing cause, a rule *nisi* only is granted; and if there be no opposition, it is afterwards made absolute. That was the case in the present instance; no cause was shewn against the rule for a *certiorari*, and the Court will not now act upon an objection which ought to have been urged against the *certiorari* in the first instance. They cited *Rex v. Sheppard* (b).

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*Scarlett* and *Patteson*, contra, were stopped by the Court.

ABBOTT, C. J.—If this were a case in which we had clearly the power of issuing a *certiorari*, and the point for consideration was, whether the Court, in the exercise of the discretion which is ordinarily vested in it in these cases, would have granted the writ, I should have thought that the last argument urged was conclusive, and that we ought not to have granted a rule for quashing the *certiorari*, because the prosecutors had an opportunity of

(a) Ante, 464.

(b) 3 B. &amp; A. 414.



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shewing cause against the rule originally obtained. But this is not one of those cases. The point here is, whether the Court has power to issue the writ; and if it appears to us, at any time, that the *certiorari* has issued in a case in which we had no authority, it becomes our duty to undo that which has been done, and quash it. The question then is, whether this be a proceeding by the Justices under the 13 *Geo. 3. c. 78.* for if it be, this Court has no power to issue the *certiorari*. It manifestly is a proceeding under that statute, and though perhaps it may be somewhat informal, yet it is in fact such a proceeding. The 13 *Geo. 3.* appears to be expressly mentioned by the very words of the Justices, for they direct that the matter shall be done "by pursuing such measures and directions in all respects, as are warranted and prescribed by the statute made in the 13th year of the reign of his late Majesty King George the Third, for the amendment and preservation of the highways, and every subsequent act or acts relating thereto." They profess, therefore, to proceed under that act, or any subsequent act or acts relating to the subject of the order. There are no subsequent acts relating to the same subject, and therefore they are proceeding, and must be taken to be proceeding, under the 13 *Geo. 3.* Whether they have proceeded formally or informally, is a matter into which this Court has no authority to inquire, because the writ of *certiorari* is taken away. I am therefore of opinion, that the rule for quashing the writ of *certiorari*, and awarding a *procedendo*, must be made absolute.

BAYLEY, J.—I am of the same opinion. I think that part of the order which, it is said, does not pursue the form required by 13 *Geo. 3.* by omitting to name the owners of the land through which the new road is to be

carried, does not afford any foundation on which the Court is at liberty to grant a *certiorari*, as if this case were out of that statute. The 13 Geo. 3. c. 78. s. 16. is the only act which gives the Justices any power to divert and turn a road without the consent of the proprietors of the land through which the new road is to be carried; and if that be so, the order in this case must be a proceeding under the statute. But I doubt very much whether, under that act, it is an essential part of the order, that the Justices should specify the names of the owners of the land through which the road is to pass. The sect. 16. contains no intimation whatever in that respect. The form of order given in the schedule to the act, certainly does leave a blank for the names of such individuals, but the form in that respect is, in my opinion, only directory. The Justices are to point out on the plan, as they have done in this case, in what direction the road is to go. They may not know at the time when they are pointing out in what direction the road is to go, who may be the different proprietors of the land; and if it were essential to name them upon the face of the order, any mistake in that respect would be fatal; and therefore I do not go along with the argument, that if we were at liberty to look at the order in question, we should be warranted in saying that it was a different order from that which the 13 Geo. 3. prescribes. There might be greater weight in that part of the observation, which says that the statute only authorises a conditional order for levying a sixpenny rate, whereas this is absolute; but that would make that part only of the order void; the rest would still stand good. If any proceeding had been taken upon it, and any part of the rate had been levied before the condition was performed, the order might not be a sufficient answer to an action of trespass brought against the party who made the levy; but I have no diffi-

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culty in saying, that this is an order made under the 13 Geo. 3, and the *certiorari* being taken away by sec. 80, of that statute, we cannot enter into the question of its sufficiency or insufficiency.

HOLROYD, J., concurred (a).

Rule absolute for quashing the *certiorari* and awarding a *procedendo*.

(a) *Best*, J., was absent.

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The KING v. The MAYOR and JUSTICES of NORWICH.

By 10 Anne, the city of *Norwich*, and hamlets and liberties of the same, were incorporated for the purpose of better employing and maintaining the poor thereof, and the guardians thereby appointed were empowered

THIS was a rule obtained on a former day, calling upon the defendants to shew cause why a writ of mandamus should not issue, commanding them to enter continuances to the next Sessions, upon the appeal of the churchwardens and overseers of the poor of the hamlet of *Lakenham*, in the city and county of *Norwich*, against a certificate of the guardians of the poor in the said city and county, certifying that the sum of 5005*l*. 13*s*. 11*d*. was needful to be raised for the maintenance and em-

from time to time to ascertain what aggregate sums would be necessary for that purpose, and ascertain what proportion each parish, &c. should contribute, and then certify the same to the Justices, two of whom were to issue their warrant, requiring the proper officers of each parish, &c. to rate and assess the amount on the respective inhabitants; and it was provided, that if any person, parish, &c. should find himself or themselves to be unequally assessed, he or they might appeal at the next Sessions held after such *assessment made and demanded*. Where under this act the governors certified that the hamlet of *L.* ought to pay a certain proportion of an assessment made upon the whole city, and two Justices issued their warrant, requiring the collectors of the hamlet to assess that sum upon the inhabitants, and the hamlet being aggrieved by such assessment:—Held, that the churchwardens and overseers might appeal against both the certificate and the warrant thereon, as being an *assessment made and demanded*, within the meaning of the appeal clause.

ployment of the poor within the said corporation, and that the sum of 286*l.* 6*s.* 11*d.* was the proportion, part, and share thereof set on the said hamlet; and also upon the appeal of the said churchwardens and overseers, against a warrant under the hands and seals of the Mayor and one of the Justices of the said city, dated 6th *September* last, directed to the assessors and collectors of the said hamlet, requiring them to assess the said sum of 286*l.* 6*s.* 11*d.* upon the several occupiers of lands, and others liable in the said hamlet; and to hear and determine the merits of the said appeals.

The affidavit in support of the rule stated, that by the statute 10 *Anne*, the city of *Norwich*, and the hamlets and liberties of the same, were incorporated for the purpose of better employing and maintaining the poor there, and that by the said act it was provided that the Mayor, Recorder, Steward, Justices of the Peace, Sheriffs, and Aldermen, for the time being, and thirty-two other persons to be chosen as therein mentioned, shall be constituted guardians of the poor, and become a corporation for the purpose of carrying the provisions of the act into effect, by the name of "The Governor, Deputy Governor, Assistants, and Guardians of the Poor in the said city and county of *Norwich*, and liberties of the same." By this act the guardians were empowered from time to time to ascertain what sums would be needful for the maintenance and employment of the poor within the care of the corporation, and also what proportion each parish, town, hamlet, precinct, or liberty, should raise and pay for those purposes, and to certify the same to the Mayor and Justices for the time being, which Mayor and Justices, or any two of them, were empowered to issue their warrant, and require the churchwardens and overseers of the poor of every parish, &c. to rate and assess the amount on the respective inhabitants, and on every parson and vicar, and

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on all and every the occupiers of lands, houses, tenements, tithes impropriate, appropriation of tithes, and on all persons having and using stocks, *and personal estates*, in the respective parishes, &c. in equal proportion, as near as might be, according to their several and respective values and estates. And it was provided by the same act, that if any person or persons, parish, precinct, or place, should find him, her, or themselves, to be unequally taxed or assessed, he, she, or they, or such parish, precinct, or place, might appeal to the Justices of the Peace at the Sessions held next after such assessment made and demanded. On the 6th *September* last, the guardians certified to the Justices, that the sum of 5005*l.* 13*s.* 11*d.* was needful to be raised for the maintenance and employment of the poor within the corporation from *Midsummer*-day then last past, to *Michaelmas*-day then ensuing, and required that that sum might be assessed and levied on every parish, &c. in such proportion as therein mentioned, and that the sum of 286*l.* 6*s.* 11*d.* was the proportion set on the hamlet of *Lakenham*; whereupon the Mayor and one of the Justices issued their warrant, directed to the assessors and collectors for the said hamlet, and required them to assess and rate the said sum upon the several occupiers of lands, and others liable in the hamlet, which they did accordingly. The hamlet of *Lakenham*, finding itself unequally assessed, did, at the then next Session, in the names of the churchwardens and overseers, enter two appeals, one against the certificate of the guardians, and the other against the warrant founded thereon. The grounds of the appeals were, that the guardians, in ascertaining the sum of 5005*l.* 13*s.* 11*d.* to be raised on the several parishes in the city, had not assessed the *personal* property belonging to the inhabitants of the different parishes according to the value thereof, whereby

the hamlet of *Lakenham* was rated more than it ought to be, and the occupiers of the hamlet were unequally and unjustly assessed and rated. At the same Sessions another appeal was entered, by an individual owner and occupier of lands in the hamlet, against the rate made by the assessors and collectors, and the grounds of the appeal were substantially the same as those in the appeals entered in the name of the churchwardens and overseers. These appeals came on to be heard on the 9th *December* last, when the Sessions refused to hear the merits of the two former appeals, on the ground that no appeal would lie against the certificate and warrant, but as to the other appeal, they entered into the merits thereof, but in the result confirmed the rate and dismissed the appeal. The affidavit stated that this rule would have been applied for in *Hilary* Term last, but the application was delayed in consequence of information from the clerk of the corporation of guardians, that a committee had been appointed to revise the assessment, which, however, never in fact took place.

*Marryat* and *E. Alderson* now shewed cause, and contended, that this rule must be discharged on three grounds; first, that no appeal was given by the statute to the churchwardens and overseers against the certificate of the corporation, or the warrant of the Justices, but was confined solely to the rate upon the inhabitants when *made* and *demanded*, under the authority of the Justices' warrant; second, that supposing the appeal to lie, the prosecutors had had all the benefit of the appeal by the individual inhabitant of the hamlet, and consequently the Sessions ought not to be called upon to hear the appeal over again; and third, that the prosecutors had now come too late in their application for a mandamus. As to the first poin, it was obvious from

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the terms of the appeal clause, that the appeal was only intended to be given to the inhabitants, against the rate assessed by the collectors and assessors of the parish, and that no appeal lay at the instance of the churchwardens and overseers, against the certificate of the corporation or the warrant of the Justices. The words of the appeal clause were, "And it is provided that if any person or persons, parish, precinct, or place, shall find him, her, or themselves, to be unequally taxed or assessed, he, she, or they, or such parish, precinct, or place, may appeal to the Justices of the Peace, at the Session to be holden next after such assessment *made and demanded*." The words "made and demanded," manifestly shewed that the appeal was given only against the parish rate when imposed under the authority of the Justices' warrant, and could not be construed to apply to the certificate or the warrant, because neither of them by itself could be called a rate or assessment. The words "made and demanded" had no sensible meaning with reference to the certificate and warrant, which could have no operation until a rate was afterwards made on each parish. The natural construction of the clause was to confine it entirely to the rate made on the parish, and unless this interpretation was given to the appeal clause, the most inconvenient consequences might ensue; for if it were competent for any of the numerous parishes in the city of *Norwich*, to appeal against the certificate, it might have the effect of quashing the assessment for the whole of the city, and the poor would be left wholly unprovided for, until a new rate could be made. This case was not within the 49 Geo. 3, which authorizes the Sessions to amend the rate, and as the corporation had no power to collect a rate, *de bene esse*, the poor of the whole city would be left without relief, if the objection to the rate in question were valid. The objection to the

rate was, that in the original assessment all the personal property in the different parishes were not included. So that as long as the smallest portion of personal property was omitted in the assessment it would be a ground for quashing the whole assessment upon all the parishes, and the poor would be absolutely without relief until the assessment was free from such an objection, an objection which would be continually arising from the fluctuation of property of that description. If one out of forty different parishes happened to be charged too high, that would be a ground for setting aside the rate for the whole city and county of *Normich*, which was a proposition that could hardly be maintained. The utmost extent to which the right of appeal given by this clause could be carried, would be to hold that the appeal lay only from one parish, against the rate of another, and not to carry it to the mischievous extent suggested. This construction would give each parish all the advantage to which it was reasonably entitled. The Court must be satisfied that the words "made and demanded," applied equally to the certificate and warrant, as to the rate assessed upon the individual parishes. In the first place, the certificate could not be called an *assessment*, and in the second the mere issuing of a *warrant*, could not be considered as a *demand*, and therefore, there was nothing to satisfy those words of the appeal clause, but the rate made by the assessors and collectors under the authority of the Justices' warrant. At all events the rate in question could not be quashed unless it was unequal upon the face of it, *Rex v. Hardy* (a), and *Rex v. Lakenham* (b). Then, secondly, these parties had had all the benefit of an appeal upon the merits of the rate, because the individual occupier mentioned in the affidavit, has been heard upon the merits of his appeal, the grounds of which were the same as those upon

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(a) Cowp. 579.

(b) 1 Const. 116, pl. 140.



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which the two appeals of the hamlet were founded, and no advantage could be gained in calling upon the Sessions to hear the same question discussed over again. But thirdly, the application for a mandamus, was at all events too late in point of time, nor was the reason suggested in the affidavit for a delay, sufficient to remove the objection. To allow the appeals at so advanced a period, would be productive of great inconvenience, and perhaps hardship, for the money collected under the rate had been, in the necessary course of things, expended, and it would be difficult to say, in case the appeals were allowed, who were the persons responsible for any surplus which might have been assessed. Besides which, it was contrary to the practice of the Court to entertain this application, inasmuch as it should have been made in the Term next after the cause of complaint arose.

*Nolan* and *H. Cooper*, contra, were stopped by the Court.

ABBOTT, C. J.—If an appeal be given by the Act of Parliament to the parish, in the instances in which these appeals were made, we are bound to give effect to the act, notwithstanding the inconveniences which may arise from such a proceeding. It is for the Legislature to remedy those inconveniences if they exist. I am of opinion that the appeal is given in this case. The governors and guardians are, in the first place, to see how much money will be wanted for the maintenance of the poor of the several united parishes of the city. Having ascertained to a certain extent the sum which will be wanted among all the parishes, they are, in the next place, to ascertain how much the aggregate sum is to be raised on each, and they are to certify the share of each, to the Justices, and the Justices are to issue their warrant to raise the sum

required. As soon as that has been done, the assessors and collectors of each parish are to raise the sum by the rate among all the inhabitants, in the same manner as a poor rate is usually raised. This is the express provision of the statute. Then comes the appeal clause, which declares, "that if any person or persons, parish, precinct, or place, shall find him, her, or themselves, to be unequally taxed or assessed, he, she, or they, or such parish, precinct, or place, may appeal to the Justices of the Peace at the Sessions to be holden next after such assessment made and demanded. That clause, in express terms, gives an appeal not only to an individual who may be aggrieved by being rated more than his neighbour, but also to any parish, precinct, or place, which may be unequally taxed or assessed by comparison with other parishes. Now, although the words "assessment, made and demanded," taken by themselves, more naturally apply to the appeal by particular individuals, after the assessment made and demanded, yet in order to give effect to the plain language of the Legislature, the parish, precinct, or place, may also appeal. We must give effect to the clause, by considering the manner in which the apportionment of the sum is to be made upon each parish, and treat the certificate of the guardians, and Justices' warrant thereon, as in law an assessment made and demanded upon the parish. I am of opinion, therefore, that by this clause an appeal is given to this hamlet, and I think it would be most unjust if an appeal were not given to any parish, precinct, or place, under the circumstances of this case. The next objection is, that the merits of these appeals have already been heard and decided through the medium of the appeal of an individual inhabitant of the hamlet; but I do not think that a sufficient ground for refusing the mandamus. If it is considered a sufficient answer to the mandamus it may be made

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matter of return to the writ. The last topic urged is, that this application should have been made to this Court sooner. Upon comparing the affidavits on the one side and on the other, there appears to have been some misunderstanding between the parties, in consequence of which, the prosecutor had forborne to apply until *Hilary* Term, which they should have done, and I think that is a sufficient reason for the delay. This rule therefore must be made absolute.

BAYLEY, J.—I am of the same opinion. When we look to the Act of Parliament we find that two assessments are to be made, and the whole fallacy of the argument turns upon that circumstance. In the first place the guardians are to make an assessment of an aggregate sum for the whole city, and then subdivide it amongst the different parishes, and when they have done that, they are to make a communication to the Mayor and Justices, who are then to call upon the proper officers to make a second assessment upon each parish. That assessment is made upon the different individuals who reside in the parish, precinct, or place on which the particular *quota* is to be levied. Great injustice might be done by throwing a greater proportion of the burthen upon one district than upon another, or by throwing upon an individual more than his neighbour. Now the appeal clause comes immediately after that clause which authorises both the assessments in question. If then the appeal clause, which comes by way of proviso immediately after that which refers to both assessments, the operation of it must be co-extensive with the enacting clause to which it applies. The terms of the appeal clause cannot be satisfied, unless we hold that it gives the power to the parish, precinct, or place, of appealing against the first assessment made by the guardians, in case they shall be aggrieved by

a greater portion of the rate than they are entitled to bear. As to the mischiefs that would be likely to result from this construction of the appeal clause, I think they need not necessarily arise, because, if the Sessions are of opinion that a particular parish has more or less than its due proportion of burthen, they may on that ground order the objectionable part of the rate to be quashed, and direct the proper proportion to be levied; for there are words in this Act of Parliament, which gives a distraining power to the Quarter Sessions. Though they are not authorised to quash the rate by any specific directions given to them for that purpose, yet they have full power and authority to give such redress, and make such orders as to them shall seem reasonable. If they find that there has been a heavier portion of the rate thrown upon one parish, in consequence of another parish not having been rated to the extent that it ought to be, there is no doubt they may give relief. For these reasons it seems to me, from the plain words of the act, it is impossible to doubt that this appeal clause applies to both assessments.

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HOLROYD, J.—I think the appeals in question are within the words and spirit of the appeal clause, which cannot be construed to exclude the general assessment, but must include the parish, precinct, or place, aggrieved by that assessment. The question is not whether the Sessions may quash the rate, but if they have authority so to do, that is no reason for excluding the right of appeal.

Rule absolute(a).

(a) Best, J., was absent.

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PRESTIDGE v. WOODMAN, Esq.

Where a Justice of the Peace does an act under colour of his office, though he exceeds his jurisdiction, he is entitled to the notice required by 24 Geo. 2. c. 44. s. 1, before the party aggrieved can bring his action.

THIS was an action of trespass and false imprisonment. Plea, Not Guilty. At the trial before *Garrow*, B. at the last Assizes for the county of *Oxford*, it appeared that the plaintiff had been convicted by the defendant, a Justice of the Peace for the borough of *Chipping Norton*, and adjudged to pay a sum of 1*l.* 17*s.* 6*d.*, under the statute 1 *Geo.* 4. c. 54, for a wilful and malicious trespass; and the defendant having issued his warrant, the plaintiff was taken up and committed to prison for a time limited, or until the money was paid. It was objected, that the action would not lie, inasmuch as the defendant had not received the notice required to be given to Justices of the Peace by 24 *Geo.* 2. c. 44. s. 1. To this it was answered, that the defendant, being a local Magistrate, had no jurisdiction to issue the warrant in question, inasmuch as it was directed generally to the constables of the county, and executed out of the borough; and therefore it was contended that the case was taken out of the statute, which required notice of action, and, consequently, that there was no necessity to prove notice. The learned Judge, however, was of opinion that the objection was fatal, and therefore directed the plaintiff to be nonsuited.

Jervis now moved for a rule to shew cause why the nonsuit should not be set aside, and a new trial granted, and contended, that as he was in a situation to prove that the defendant was a local Magistrate only, and had no jurisdiction in the place in which his warrant was executed, he was not entitled to notice of action, and relied upon the case of *Blatcher v. Kemp* (a), and upon the words of

(a) 1 H. Bl. 15, n. (a).

the statute, "for any thing by him done *in execution of his office*." In the present case, the act of the Magistrate was a wrongful act from beginning to end; for it was an act done out of his jurisdiction, and could not possibly be construed to be done "in execution of his office," because his office was limited to his jurisdiction. Beside this, he had an affidavit, shewing that the place in which the plaintiff was alleged to have committed the trespass was not locally within the borough of *Chipping Norton*. Upon these grounds, he contended, that the nonsuit ought to be set aside.

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ABBOTT, C. J.—I am of opinion that the nonsuit in this case ought not to be set aside. The case cited is widely distinguishable from the present. That was an action against a constable, for acting under a warrant which was not directed to him, and in which he was not named; and the distinction taken by Lord *Mansfield*, in the case of *Money v. Leach*(a), applied there, namely, that where the Magistrate cannot be liable, the constable is not within the protection of the statute; but this is an action against the Magistrate. Then, as to the language of the statute; I am of opinion that the defendant has not excluded himself from its operation. He was acting *quà* Magistrate, and though he made a mistake in the warrant, still he was acting in execution of his office. But it has been expressly decided, in a case precisely similar in principle to this, that a notice was still necessary, although the Magistrate had acted erroneously. *Weller v. Tooke*(b). There is, therefore, no ground for the present application.

BAYLEY, J.—I am of the same opinion. It has been decided over and over again, that notice of action is not necessary, unless the Justice has exceeded his jurisdiction,

(a) 3 Burr. 1766. 8.

(b) 9 East, 364.

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in which case he is entitled to notice. The defendant does the act complained of under colour of his office, and that brings him within the protection of the statute, even though he had no jurisdiction in the place where his warrant was executed. It is said, that the place where the plaintiff committed the act imputed to him was not locally within the borough; but the defendant might not accurately know the exact boundary of the local jurisdiction. It is clear, that if he kept within the line of his authority, there would have been no occasion to give him notice; but it is because he is supposed to have exceeded his authority, that notice becomes necessary. Many cases have decided, that though the Justice exceeds his powers, yet, if he is acting *bonâ fide*, and under the supposition that he is right, he is entitled to notice, the object of the notice being, that if he be wrong, he may set himself right by tendering amends. In a case decided in the interval between *Douglas's Reports* and the *Term Reports*, it was distinctly laid down by the Court, that it is immaterial whether the Justice had a right to act or not; for if he thought he had a right to act he was entitled to notice (a).

HOLROYD, J. and BEST, J., concurred.

Rule refused.

(a) *Bird v. Constable*, Mich. 25 Geo. 3. That was the case of a person convicted of riding on the shafts of his cart on the King's highway. It appeared that at the time the man was on the shafts, his cart was standing still, and consequently the case was not within the statute, inasmuch as the cart was not in motion, but he was nevertheless convicted by the Justice; and the question was, whether the Justice was entitled to notice of action. The Court said, it was immaterial whether the Justice had a right or not to act in the way complained of; for if he thought he had a right to act, he was clearly entitled to notice.

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**APPRENTICE.**

Declaration upon an indenture of apprenticeship, whereby a master covenanted, in consideration of a pre-

mium of 90*l.*, to instruct his apprentice in the business of a tobacconist, for four years, and to board and lodge him during that time, alleged, 1. A general breach in the terms of the covenant; 2. A particular breach on the 13th July, averring a refusal to instruct on that day or at any other time; and, 3. A similar breach as to boarding and lodging on the same day, and alleging that on that day the master compelled the apprentice to quit the service, and refused to maintain and keep him, contrary to the effect of the covenant. Pleas, 1. Performance of the covenant until the 10th July; 2. Willingness to maintain and keep the apprentice during the whole term, but that from the date of the indenture until the 10th July the apprentice would not truly and faithfully serve defendant, nor attend to his business, but refused so to do, and setting forth various acts of misconduct on his part during the interval mentioned, and concluding, that, on the 10th July, the apprentice, against the orders of defendant, quitted the service, declaring that he would never return again, whereby defendant was hindered and prevented from performing his covenant; 3. Readiness to instruct and maintain according to the effect of the covenant, but averring neglect and refusal of apprentice to obey defendant's lawful commands on the 10th July, and a refusal any longer to serve him, and absconding on that day, whereby he was prevented from performing his covenant; 4. Averring a wrongful absence of the apprentice on the 10th July, whereby, &c.; and,



5. A denial that defendant had compelled the apprentice to quit his service. Replication took issue on the first and fifth pleas, and as to the other pleas there was a confession of the breaches of duty mentioned therein; but replying, that on the 13th July the apprentice returned to defendant, and tendered and offered himself to serve and obey him according to the indenture, but that defendant upon request refused to take him back, &c. Demurrer to the replication to the second, third, and fourth pleas, and joinder therein:—Held, that covenant would lie upon the indenture, notwithstanding the misconduct of the apprentice:—Held also, that there was no departure or discontinuance in the pleadings.

*Winstone v. Linn*, 4 G. 4. Page 327

See SETTLEMENT, 4, 13.

#### ASSAULT.

See JUSTICE OF PEACE, 2.

#### ASSESSMENT.

See POOR RATE, 7.

#### ATTORNEY.

See PRISONER.

#### AWARD.

This Court will not entertain an application for setting aside an award, founded upon an indictment at the Assizes for not repairing a road, though the question in dispute be of a civil nature. *Rex v. The Inhabitants of Cotesbach*, 3 G. 4. 255

#### BASTARDY.

1. An order of bastardy not made until twelve years after the death of the child, whereby the putative father (who had in the mean time absconded) is adjudged to pay two several sums, one for the bye-gone maintenance, and the other for the costs, is void; and though the filiating Justices commit the father upon an illegal warrant, from which he is discharged at the next Sessions, still they may afterwards issue a fresh warrant, founded on the original order; but if the case falls within 49 Geo. 3. c. 68. s. 3, as an order unappealed from, the commitment for non-payment of maintenance

#### BYE LAWS.

must be for three months, unless the money is sooner paid. A general commitment until the putative father pays two several sums, one for maintenance, and the other for costs, is bad in toto. *In re Joseph Addis*, 3 G. 4. Page 196

2. By statute 49 Geo. 3. c. 68. s. 5. the notice of appeal, in a matter of bastardy, must specify the cause and matter thereof. Where a notice given by the reputed father of a bastard child, of his intention to appeal against the order of filiation, merely stated that he intended to prosecute an appeal against an order of filiation, whereby he was adjudged to be the father of a female bastard child, born of the body of E. H., and chargeable to the parish of S. L. pursuing the words of the order without specifying the particular grounds of appeal:—Held, that the notice of appeal was insufficient. *Rex v. The Justices of Gloucestershire*, 4 G. 4. 281

See SETTLEMENT, 3, 5.

#### BATH.

See COUNTY RATE, 1.

#### BENEFIT SOCIETY.

A bond given to the Treasurer of a Benefit Society, for the use of the Society, is an available security at common law, though the rules and regulations of the Society have not been exhibited, confirmed and filed, at the Quarter Sessions, in pursuance of the statute 33 Geo. 3. c. 54. s. 2. *Jones v. Woollams*, 3 G. 4. 101

#### BIRMINGHAM.

See OVERSEERS, 2.—POOR RATE, 3.

#### BRISTOL.

See COURT OF REQUESTS.

#### BYE LAWS.

The words “shall be lawful,” when found in the bye-law of a corporation, are not to be construed as obligatory to do what the law ordains. Therefore where a bye-law of the borough of Eys ordained, that, upon the happening of any vacancy in the number of twenty-four common councilmen, such vacancies should be filled by the freemen inhabiting

the town, and that a great court should be holden once every quarter, at which it "should be lawful" for the bailiffs to admit to the freedom of the town such persons as had been resident therein for one whole year:—Held, that this bye-law was only optional, and could not be enforced by mandamus to compel the admission of qualified inhabitants to the freedom of the borough. *Rex v. The Borough of Eye*, 3 G. 4.

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See CHARTER.

CASE.

1. Falsely, maliciously, and without any probable cause, procuring the warrant of a Justice, to search the premises, and apprehend the person of A., on suspicion of felony, and thereby causing his premises to be searched, and his person imprisoned, is properly the subject of an action on the case, and not trespass. *Else v. Smith*, 3 G. 4. 28
2. A positive oath, that a felony is actually committed, is not necessary to justify a Magistrate in granting his warrant to search the premises, and apprehend the person of a party suspected of felony; and though it may be trespass in the Magistrate, to grant an illegal warrant, yet it is case, in the person who causes and procures such warrant to issue, if it is done maliciously, and without reasonable or probable cause. *Id.*
3. If A., under pretence of a purchase, obtains possession of B.'s goods, with a pre-conceived design not to pay for them, and absconds to avoid suit for the value, and the sheriff seizes such goods in execution immediately after the delivery to A., it seems that B. may lawfully rescue them out of the hands of the sheriff even by stratagem, but the validity of the purchase by A. is a question for the jury. *Earl of Bristol v. Wilmore*, 4 G. 4. 407

CERTIORARI.

1. The Court will not grant a certiorari, in the first instance, to remove the order for the appointment of overseers, for the purpose of having it quashed, on a suggestion that the Justices made the appointment from

corrupt and improper motives—the propriety of the appointment being matter of appeal to the Sessions; but they will grant a criminal information against the Justice, if the corrupt and improper motive for making the appointment be satisfactorily established. *Rex v. The Justices of Somersetshire*, 3 G. 4.

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2. The statute 12 Geo. 1. c. 34. s. 3. makes it an offence for clothiers and other manufacturers to pay the wages of their workmen in goods instead of money; the stat. 22 G. 2. c. 27. creates several new offences, and extends the provisions of the preceding statute to silk manufacturers; and the 17 G. 3. c. 56. s. 22, takes away the certiorari, upon convictions under the 22 Geo. 3. A silk manufacturer having been convicted under 12 Geo. 1. c. 34. s. 3, and 22 Geo. 2. c. 27:—Held, that he was not deprived of the certiorari by force of the 17 G. 3. c. 56:—Held also, that the six months limited by the statute for bringing the certiorari, was to be computed from the time the conviction was affirmed by the Sessions, and not from the time of the conviction by the Justices below. *In re Kaye*, 3 G. 4. 114
3. After conviction and judgment at the Sessions, the Court will not grant a certiorari to remove the proceedings for the purpose of having an indictment quashed on motion for error on the record. *Rex v. The Inhabitants of Penegoes and Machynlleth*, 3 G. 4. 243
4. A certiorari always lies to remove proceedings under penal statutes, unless it is expressly taken away; and an appeal never lies unless it is expressly given by the statute. *Rex v. The Hundred of Cashibury*, 4 G. 4. 485

See HIGHWAY, 5.—TITHES.

CHALLENGE.

See JURY.

CHARGEABILITY.

See SETTLEMENT, 3.

CHARTER.

If there are words of permission in a charter, to do an act, which is clearly for the public benefit, they

are obligatory; therefore, where a charter declared, that the mayor and jurats of an ancient town *might* hold a court of record, for the holding of pleas, but which had been long disused, the Court granted a mandamus, to compel such Court to be held at the instance of an inhabitant of the town, though he was not a corporator. *Rex v. Mayor and Jurats of Hastings*, 3 G. 4.

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See BYE LAWS.

### CHURCHWARDENS AND OVERSEERS.

The statute 18 Geo. 3. c. 25. s. 5, gives an appeal to the Sessions against the allowance by two Justices, of constables' accounts, "in case the overseer or overseers shall find that the parish or township is aggrieved" thereby; but the right of appeal cannot be exercised by one overseer without the consent of the majority. Therefore, where a township had four overseers, and four churchwardens, and seven were for allowing the constables' accounts, against the sense of the eighth, and a majority of the lay-payers; and two Justices afterwards allowed the accounts:—Held, that the single overseer could not appeal against the allowance, in his own name, and this Court refused a mandamus to the Sessions, to hear the appeal. *Rex v. The Justices of Manchester*, 3 G. 4. 117

See CERTIORARI, 1.—COSTS.—INFORMATION.—MANDAMUS, 1.—OVERSEERS.—POOR, 2.—POOR RATE, 7. SESSIONS, 2.

### COMBINATIONS.

See SESSIONS, 4.

### COMMITMENT.

1. By statute 1 & 2 Geo. 4. c. 118. s. 40, the penalties imposed by the same, are directed to be distributed, one half to the receiver therein mentioned, and the other to such persons as the convicting Justices shall direct, and it gives no appeal to the Sessions. Where a prisoner was committed, under a warrant of execution, (which recited that he had been convicted) for two months, or until he had paid a penalty of 5*l.* for an offence un-

### CONSTABLE.

der the 33*d* section of the act, without stating how the penalty was to be distributed, and to whom paid; the Court refused to discharge him out of custody for this objection, holding that the warrant did not require the same certainty as a conviction, and that they were bound to presume there had been a legal conviction to found the warrant. *Rex v. Rogers*, 3 G. 4. Page 59

2. It is no offence within the statute 1 Geo. 4. c. 56. "wilfully and maliciously to carry away" a post or pale, unless the party charged has wilfully or maliciously committed the damage, injury, or spoil, alleged. Therefore, where a defendant, charged with cutting, spoiling, and taking and carrying away, a post out of a fence, was committed for *wilfully and maliciously carrying the same away*, only:—Held, that the commitment was bad, and the defendant entitled to be discharged. *Rex v. Harpur*, 3 G. 4. 67

3. Justices, under the same statute, may award satisfaction for a malicious injury, to the amount of 5*l.*, but in each case the extent of the injury is to be ascertained by the Justice, and compensation awarded only in proportion to the injury proved. *Id.*

4. A commitment in execution need not recite the title of the statute on which the proceedings are founded. *Id.*

5. A commitment for punishment, must be for a time certain; therefore, where a defendant was committed by two Justices, for a contempt towards them in their office "until discharged by due course of law:"—Held, that the commitment was bad. *Rex v. Thomas James*, 3 G. 4. 131

### CONDITION.

See SETTLEMENT.

### CONSPIRACY.

See EVIDENCE.—WITNESS, 1.

### CONSTABLE.

1. The office of constable being a burthensome office, this Court will not put a person *de facto* elected, and sworn in by the Court-leet, to the expense of shewing by what authority he holds the office, at the

## COSTS.

relation of a different body of persons, claiming the right of election, where those persons do not shew an immemorial custom in their body to elect. *Rex v. Law*, 3 G. 4. Page 25

2. If a warrant be directed to a constable by name, he may execute it any where within the jurisdiction of the Magistrate; but if it is directed to him by his name of office, he can execute it only in the parish, &c. of which he is a constable. Therefore where a warrant for levying a rate was directed "to the constables of the parish of W., and to all others his Majesty's officers whom these may concern," and a constable of W., in attempting to execute it in the parish of D., was assaulted:—Held, that the assault was justifiable. *Rex v. Weir and Others*, 4 G. 4.

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See CHURCHWARDENS AND OVERSEERS.

## CONVICTION.

This Court will not take notice of any formal defect in the proceedings under a penal statute, unless it appears on the face of the conviction itself. *Rex v. The Hundred of Cuckbury*, 4 G. 4.

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See GAME.—JUSTICE OF PEACE, 2.—PRISONER.—SESSIONS, 2, 3, 5.—SMUGGLERS.

## CORPORATION.

Mandamus will not lie to admit an inhabitant of a borough by prescription to be a free burgess, unless it appear first, that he has an inchoate right to be a free burgess; and, second, that the office of free burgess is a corporate office by prescription. *Rex v. West Lane*, 3 G. 4.

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See POOR RATE, 2.

## COSTS.

Where Justices had made a false return to a mandamus to appoint overseers for a township, and the Court had thereupon granted a rule nisi for a criminal information; and on shewing cause against that rule, contradictory facts were disclosed, which were directed to be tried by an issue, and after an issue had been prepared and delivered, the Justices had abandoned the issue,

## COUNTY RATE.

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and obtained a Judge's order for staying proceedings, without prejudice to the question of costs, the Court ordered the Justices to pay the prosecutor the costs of preparing and delivering the issue. *Rex v. The Justices of Lancashire*, 3 G. 4.

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## COUNSEL.

If the counsel for the defendant, on an indictment for a misdemeanor, opens new facts in his address to the Jury, and afterwards declines calling witnesses to prove the facts so opened, the counsel for the prosecution is, notwithstanding, entitled to a general reply. *Rex v. Biggald*, 3 G. 4.

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See PRISONER.

## COUNTY RATE.

1. The proviso in 55 Geo. 3. c. 51, s. 1. exempting places situate within liberties or franchises, having a separate jurisdiction, from contributing to the county rate, extends only to places which have a jurisdiction separate from, and co-extensive with, the jurisdiction of the county Justices; therefore, the city of Bath, in which the Justices have a separate jurisdiction, for some purposes, but not for all, and who commit felons to the county goal for trial at the assizes, and thereby burthen the county, is not a liberty or franchise having a separate jurisdiction, and consequently is liable to the Somersetshire county rate. *Rex v. William Clark*, 3 G. 4.

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2. An order of Sessions for assessing and levying a specific sum of money, to enable the county treasurer to re-pay persons who had advanced money for county purposes, on the credit of the county rates, is bad on the face of it, inasmuch as it is a rate to reimburse, which the Sessions have no authority to make. *Rex v. The Justices of Flintshire*, 3 G. 4.

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3. A county treasurer, authorised by an order of Sessions to raise money on the credit of the county rates, obtained advances from time to time from his bankers, and died in their debt. The Sessions, being satisfied that the money so advanced had been bona fide appropriated to county purposes, made an order for

assessing and levying a sum of money towards the re-payment of the debt, but this Court quashed the order. *Rex v. The Justices of Flintshire*, 4 G. 4. Page 451

### COUNTY TREASURER.

See COUNTY RATE.—EXPENSES.

### COURT LEET.

See CONSTABLE, 1.

### COURT OF REQUESTS.

The Courts of Requests Act, 23 G. 3. c. 38. s. 8. declares, that no person shall be capable of acting as a Commissioner in the execution of any of the acts for constituting such courts, unless such person shall be a HOUSEHOLDER within the county, &c. for which he shall act. The word "householder" in this act does not mean a personally resident housekeeper, and therefore where a person had been elected to the office of Registrar and Clerk of the Court of Requests of the city of Bristol, by a majority of householders, paying rent, rates, and taxes, and resident by their partners in trade or their servants only:—Held, that the election was valid. *Rex v. Hall*, 3 G. 4. 232

See OVERSEERS.

### COURT ROLLS.

See MANDAMUS.

### CRIMINAL INFORMATION.

See CERTIORARI, 1.—COSTS.—INFORMATION.

### CUSTOMS.

By statute 57 Geo. 3. c. 87. s. 6, persons liable to be arrested under the acts for the prevention of smuggling, and who are fit and able to serve on board a King's ship, shall be taken before a Justice, and upon due proof, be committed, further to answer, &c., and after being so committed, the gaoler in whose custody they are kept, is authorised, on the order of the Commissioners of Customs or Excise respectively, to convey them on board a ship of war, in order to their being impressed. Where persons were impressed under the authority of this act, by virtue of an order signed only by four

### EMBEZZLEMENT.

Commissioners of Customs, out of the nine nominated and appointed by the King's patent:—Held, that such order was valid and effectual, it appearing by the patent that four of the Commissioners might act for the whole body, and therefore the Court refused to discharge the prisoners out of custody. *Ex parte White and another*, 3 G. 4. Page 55  
See CONSTABLE.—HABEAS CORPUS.

### DEAD BODIES.

See MISDEMEANOR.

### DEFENDANT.

See COUNSEL.

### EMANCIPATION.

See SETTLEMENT, 1, 3, 7.

### EMBEZZLEMENT.

1. A person employed as a journeyman in the trade of a miller, and in the habit of receiving money on his master's account, comes within the Embezzlement Act, 39 Geo. 3. c. 85. *Rex v. Barker*, 3 G. 4. 559
2. Where a defendant had established a Saving Bank, consisting of 130 members, each of whom paid a weekly subscription of 2s. 1d., the odd penny being paid to the defendant for the trouble of managing the affairs of the bank, the funds of which were to be disposed of once a week by lottery, consisting of 129 blanks and one prize amounting to 13l., which was to go to the holder of the fortunate ticket; and the defendant having absconded, after receiving from one of the subscribers deposits to the amount of 10l. 8s., without receiving any benefit therefrom:—Held, that the defendant was not indictable under the 52 G. 3. c. 63, for embezzling the money as an "agent," or as a person having the possession of money "for safe custody;" and held that, as the defendant had never at any one time more than 2s. 1d. in her possession belonging to the prosecutrix, though she had received, in the aggregate, the whole sum of 10l. 8s., the indictment charging her with receiving that sum generally, could not be supported.

*Quære*, whether money can be considered as personal effects, within

## EXTRA PAROCHIAL.

the meaning of the 52 Geo. 3. c. 63.  
*Res v. Mason*, 3 G. 4. Page 362

See COUNSEL.

## ESTATE.

See SETTLEMENT, 7, 15.

## EVIDENCE.

Where two defendants were indicted for a conspiracy to commit a fraud, and the defence of one was, that he himself had been deceived by the representations of his co-defendant, and part of a written correspondence between the defendants having been received in evidence for the Crown:—Held, that the whole of the correspondence between the defendants up to the time of the overt act of the conspiracy, was admissible in evidence for the defence. *Res v. Whitehead*, 3 G. 4. 367

See COUNSEL.—EXPENSES.—HIGHWAY.—INCLOSURE ACT.—MISDEMEANOR.—PRISONER.—TITHES.—WITNESS.

## EXAMINATION.

See PRISONER.

## EXPENSES.

The statute 58 Geo. 3. c. 70. s. 4. authorises the Court to order the county treasurer to pay to the prosecutor or witnesses who shall appear to have been active in the apprehension of any person, and who shall give evidence against any person accused of grand or petit larceny, &c., the costs of prosecuting and appearing before the Grand Jury; and also to compensate them for their loss of time and trouble in such apprehension. Where a person had travelled 300 miles and incurred an expense of 17*l.* in tracing and endeavouring to bring two horse stealers to justice, and had succeeded in apprehending them:—Held, by *Park, J.* that under this statute he was not entitled to any compensation for the money so expended. *Res v. Austr*, 3 G. 4. 364

See PRISONER.

## EXTRA PAROCHIAL.

See SETTLEMENT, 5.

## HIGHWAY.

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## FELON.

See EXPENSES.—HABEAS CORPUS.—MISDEMEANOR.—PRISONER.

## GAME.

A conviction on the statute 5 Ann. c. 14. s. 4, for keeping and using a gun to kill and destroy game without being qualified, must be made within three lunar months after the offence is committed. *Res v. Bellamy*, 4 G. 4. Page 376

See CONVICTION.

## GAMING HOUSE.

Keeping and maintaining a common gaming house, and for lucre and gain, causing and procuring idle and evil-disposed persons to come there to play together, at "Rouge et Noir," and permitting such persons to play at such game for large sums of money, is an offence indictable at common law. *Res v. Rogier and another*, 4 G. 4. 284

See SESSIONS, 5.

## GAS.

See POOR RATE, 3.

## HABEAS CORPUS.

Where prisoners taken into custody after an engagement at sea between a revenue cutter and a vessel suspected to be a smuggler, of which the prisoners were the crew, were delivered on board a King's ship, and detained for fourteen days without any warrant, and were afterwards brought up by habeas corpus to be discharged, and it appearing from the return that there was cause to suspect them of felony, the Court refused a discharge, and directed them to be committed to the custody of the Marshal of the Marshalsea, in order that they might be taken before a competent tribunal, to be dealt with according to law. *Ex parte Kraus*, 4 G. 4. 278

## HIGHWAY.

1. Where a way has been used by the public for a great number of years over a close, leading only to the houses of lessers, there being no thoroughfare, the privity of the landlord, and a dedication by him to the public, is essential to constitute it a public highway. And



evidence that the *locus in quo* has been paved and lighted for the like number of years, under the authority of a public, local, and personal Act of Parliament, in which it is enumerated by name amongst the public streets, lanes, &c. within the scope of the statute, does not prejudice the reversionary rights of the owner of the fee. *Wood v. Veal*, 2 G. 4.

Page 11

2. An order made by Justices of Peace under statute 55 Geo. 3. c. 68. s. 2, for stopping up an old highway, and setting out a new one, must shew that it is made with the consent in writing under the hand and seal of the owner of the land through which the new highway is proposed to be made. Where an order, made under this statute, recited that the Justices had received evidence of the consent of T. J., Esq. in his life-time, to the new road being carried through his lands, by writing under his hand and seal, and it appeared that another person was owner of the land at the time the order was made:—Held, that such order was insufficient, and could not be carried into execution. *Rex v. The Justices of Denbighshire*, 3 G. 4. 139

3. Whether a rector who lets his tithes by parol to the occupiers of the lands, in respect of which the tithes arise, and receives a half-yearly composition in the nature of rent, can be treated as an occupier of tithes within the meaning of the General Highway Act, 13 Geo. 3. c. 78. s. 34, and rated to the highways in the parish? *Rex v. The Justices of Buckinghamshire*, 4 G. 4. 369

4. By 55 Geo. 3. c. 68. s. 2, the consent in writing for turning a footpath must be under the hand and seal of the owner of the land through which the new path is proposed to be made; therefore where an order of Justices for turning a footpath was founded upon a consent, signed and sealed by the attorney of one of the parties interested, and there being nothing to bind the principal:—Held ill, and quashed by this Court after confirmation by the Sessions. An order made under this statute, cannot be confirmed until the Sessions held next after the expiration of four weeks from the first day on

which the notices required by law shall have been published; therefore, where an order was made for diverting a path, and notice thereof given on the 20th December, and it was confirmed at Sessions on the 17th January:—Held irregular, and quashed. *Rex v. Crewe*, 4 G. 4.

Page 464

5. The statute 13 Geo. 3. c. 78. s. 80, prohibits the removal by *certiorari* into this Court of any proceedings had in pursuance of that act. Where an order was made by two Justices, and confirmed by the Sessions, for diverting a road, professedly under the authority of, but (as was alleged) without pursuing all the formalities required by the act:—Held, that the *certiorari* was still taken away; and after the proceedings had been in fact removed, the Court quashed the *certiorari*, *quia improvide emanavit*, and refused to discuss the sufficiency or insufficiency of the order.

*Quære*, whether an order for diverting and turning an old road, need set out the names of the owners of the land through which the new road is proposed to be carried. *Rex v. Casson and others*, 4 G. 4. 486

See AWARD.—MANDAMUS, 3.

## HIRING.

See SETTLEMENT, 10.

## HOUSEHOLDER.

See COURT OF REQUESTS.—OVERSEERS.

## INCLOSURE ACT.

A ditch is a fence within the meaning of the General Inclosure Act, 41 Geo. 3. c. 109. Therefore where the issue was, whether a certain allotment was bounded by a sufficient fence within the meaning of a Local Inclosure Act, which required that the allotments “should be inclosed and fenced on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed land, or be bounded by any river or other sufficient fence,” and the proof was, that part of the *locus in quo* was bounded by an old

deep ditch :—Held, that this was a sufficient fence within the meaning of the statute. *Ellis v. Arnison*, 3 G. 4. Page 193

INDICTMENT.

See GAMING HOUSE. — HOUSEHOLDER.—MANDAMUS, 2. 3.—MISDEMEANOR.

INFORMATION.

*Quere*, Whether a criminal information will lie against Justices for making a false return to a mandamus, unless the return is corruptly and wilfully false. *Rex v. The Justices of Lancashire*, 3 G. 4. 127

See CERTIORARI, 1.—COSTS.

IRISH.

See SETTLEMENT, 3.

JURISDICTION.

See COUNTY RATE.—HABEAS CORPUS.—JUSTICE OF PEACE, 3. 4.—SMUGGLERS.—TITHES.

JURY.

Where upon a challenge to the array for unindifferency in the sheriff, the Jury panel is quashed :—Held, that the proper course to obtain a trial of the cause, is to direct new Jury process to the Coroners of the county, at the instance of the prosecutor, but not without applying to the Court specially for that purpose. *Rex v. Dolby*, 3 G. 4. 49

JUSTICE OF PEACE.

1. The Court will not direct in what manner Justices shall make their return to a mandamus, but if the return made to a mandamus be insufficient to raise the question intended to be agitated, the Court will, at the instance of the party interested, make a rule, giving the Justices liberty to amend it in the manner required, if they shall be so minded. *Rex v. Marriott and another*, 3 G. 4. 62

2. The statute 13 Geo. 3. c. 78. s. 60, imposing a penalty on the driver of a cart, &c. for riding thereon under the circumstances therein mentioned, authorises a Justice on his own view, or upon the oath of one witness, to convict the offender, and in case the offender refuses to discover

his name, or the name of the owner of the cart, &c. he is subjected to a like penalty, and may, without warrant, be apprehended forthwith by the person seeing the offence committed. Where the driver of a waggon committed an offence within this act, in the view of a Justice, and having placed himself before the board on which his master's name was painted, so as to prevent the discovery of the owner, and the Justice, in order to ascertain the name, stopped the horses and laid hands on the driver, and removed him from his position before the board, and thereby informed himself of the ownership :—Held, on demurrer, that this was a trespass, and gave the driver a right of action. *Jones v. Owen*, 4 G. 4. Page 290

3. In a case where Justices have reasonable ground for doubting their jurisdiction, the Court will not compel them to do an act which may subject them to an action. *Rex v. The Justices of Buckinghamshire*, 4 G. 4. 569

4. Where a Justice of the Peace does an act under colour of his office, though he exceeds his jurisdiction, he is entitled to the notice required by 24 Geo. 2. c. 44. s. 1, before the party aggrieved can bring his action. *Prestidge v. Woodman*, 3 G. 4. 502

See CASE, 1. 2.—CERTIORARI, 1.—CHURCHWARDENS AND OVERSEERS.—COSTS.—COUNTY RATE.—CUSTOMS.—INFORMATION.—SESSIONS.—SETTLEMENT.—SMUGGLERS.—TITHES.

LIGHTING.

See RATE.

LORD OF MANOR.

See MANDAMUS, 3.

MALICIOUS INJURY.

See COMMITMENT, 2. 3.

MANCHESTER.

See RATE.

MANDAMUS.

1. Mandamus issued to receive an appeal against overseers' accounts, though the allowance had not been previously made at a special Sessions



under 50 Geo. 3. c. 49. s. 1. *Rex v. The Justices of Colchester*, 3 G. 4.

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2. Defendant having been convicted of forcibly passing a turnpike gate without paying toll, the Sessions, on appeal, rejected evidence to shew that the gate had been unlawfully erected, and this Court refused a mandamus, to compel the Sessions to receive such evidence, the admissibility of it being exclusively a question for the Justices: and the Court also refused to issue a mandamus to the Sessions, to hear an original complaint, touching the conduct of the trustees in the erection of the gate, after a lapse of twenty-six years from the time when it was erected, leaving the party to proceed by indictment for the nuisance, or by an action of trespass if his passage was obstructed. *Rex v. The Justices of Cambridgeshire*, 3 G. 4. 86

3. Mandamus will not lie to the lord and steward of a manor, to inspect court rolls, for the purpose of supporting an indictment against the lord for not repairing a road within the manor. *Rex v. Lord Cadogan*, 3 G. 4. 132

See CHARTER. — CHURCHWARDENS AND OVERSEERS. — JUSTICE OF PEACE, 1.—SESSIONS, 1.

#### MANOR.

See MANDAMUS, 3.—TOLL.

#### MANUFACTURERS.

See CERTIORARI, 2.—SESSIONS, 5.

#### MARKET.

See TOLL.

#### MISDEMEANOR.

To sell the dead body of a capital convict, for dissection, where dissection is no part of the sentence, is a misdemeanor, indictable at common law.

Indictment, "that one E. L. was publicly executed at, &c., and that one G. C. of, &c. undertaker, was retained and employed by W. W. the keeper of the gaol in and for the said county, to bury the body of the said person so executed, for certain reward to be therefore paid to the said G. C., by and on behalf of the

#### OVERSEERS.

said county, and in pursuance of the said retainer and employment, the body of the said person so executed was then and there delivered to the said G. C. for the purpose of being so by him buried as aforesaid, and it then and there became the duty of the said G. C. to bury the same accordingly, but that the said G. C. being, &c. and having no regard to his said duty, nor to, &c. did not, nor would bury the said body, but on the contrary thereof, unlawfully, &c. and for the sake of wicked lucre and gain, did take and carry away the said body, and did sell and dispose of the same, for the purpose of being dissected, &c. to the great scandal, &c.:"—Held, that the indictment was well framed, though apparently drawn in the language of a declaration in assumpsit:—Held also, that to support the indictment, it was not necessary there should be direct evidence that the defendant had sold the body for lucre and gain, and for the purpose of being dissected. *Rex v. Cundick*, 3 G. 4. Page 356

See COUNSEL.—EVIDENCE.

#### NORWICH.

See POOR RATE, 7.

#### NOTICE OF ACTION.

See JUSTICE OF PEACE, 4.

#### NOTICE OF APPEAL.

See SESSIONS, 5.

#### NUISANCE.

See MANDAMUS, 2.

#### OFFICE.

See SETTLEMENT, 12.

#### OVERSEERS.

1. A person occupying a house in one parish by means of a clerk only, and paying rent, rates, and taxes, but sleeping in another parish, is a *substantial householder*, and liable to serve the office of overseer of the poor in the first-mentioned parish. *Rex v. Poynder*, 3 G. 4. 247
2. By statute 23 Geo. 3. regulating the affairs of the poor of Birmingham, the guardians and overseers thereby appointed, are directed to adjust

## POOR.

their accounts at quarterly meetings of their own body; and an appeal is given to the Sessions in respect of all matters done by virtue thereof; but the statute is silent as to any submission of the overseers and guardians accounts to Magistrates, as required by 50 Geo. 3. c. 49.—Held, however, that mandamus would lie from this Court to the guardians and overseers, to pass their accounts in the manner required by that statute. *Res v. The Justices of Warwickshire*, 3 G. 4.

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See **MANDAMUS**, 1.

**PAVING.**

See **RATE**.

**PAWNBROKER.**

The General Pawnbroker's Act, 39 & 40 Geo. 3. c. 99. s. 17, declares that goods, &c. which are pledged, and are not redeemed within a year after the day of pledging, shall be forfeited, and may be sold by the pawnbroker:—Held, that where the plaintiff had pawned a watch, &c. and after the year had expired, tendered the money lent, and interest, and the pawnbroker refused to deliver, he might maintain trover, not having forfeited his title to the goods, by reason of that section of the statute. *Walter v. Smith*, 3 & 3 G. 4. 1

**PERJURY.**

Where an information for perjury committed before a Select Committee of the House of Commons, appointed to try and determine the merits of an election, averred, that the committee was appointed for that purpose, and that the committee were sworn "to try the matter of the petition, &c.:"—Held, that the situation of the committee was well described to support the averment, though described in 10 G. 3. c. 16. s. 13, as a select committee "to try and determine the merits of the return or election." *Res v. Patrick Dunn*, 2 G. 4. 8

**POOR.**

1. Landlord not resident within the parish, having granted a license for 21 years to certain adventurers, to

## POOR RATE.

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dig for minerals under a close, reserving to himself a certain proportion of the ore, in an improved and merchantable state, and granting to the adventurers the exclusive occupation of the mine, for the purpose of procuring the ores, is rateable for the relief of the poor of the parish in which the mine is situate, in respect of such reserved proportion, and in respect thereof, is to be considered as an occupier of the land by the hands of the adventurers. *Res v. St. Austell*, 3 G. 4.

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2. An acting guardian of the poor is liable to the penalties of the statute 55 Geo. 3. c. 137. s. 6. for supplying the poor of the parish with provisions, though there be no proof of his appointment. If a parish officer is liable to the penalties imposed by 22 Geo. 3. c. 83. s. 47, still he may be proceeded against under the general act 55 Geo. 3. c. 137, without regard to the former statute. Where the declaration alleged that the defendant was a person having the providing for, ordering, management, control, and direction of the poor of the parish of W., and that he had supplied the poor of the parish with provisions; and it appearing that W. was one of five united parishes, whose poor were jointly maintained by all the parishes in one common workhouse:—Held, that the offence was well laid. *Semble*, that the declaration need not have alleged that the provisions were supplied "for the use of the workhouse," in order to bring the case within the statute. *West v. Andrews*, 3 G. 4.

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See **OVERSEERS**, 2.

**POOR RATE.**

1. Where firs and larches were planted with oak and ash trees, principally for the purpose of affording a screen or shelter to the latter in their infancy, and were cut from time to time as the oaks and ashes required more room to spread, and when once cut did not spring again, and although, when sold, they yielded a profit:—Held, that they were not saleable underwood within the statute 43 Eliz. c. 2, and therefore not

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rateable to the relief of the poor. *Qu.* Whether under any circumstances firs and larches can be considered underwood? *Rex v. The Inhabitants of Ferrybridge*, 4 G. 4.

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2. Where a corporation, consisting of a mayor, aldermen, and twenty-four capital burgesses, was seised in fee of certain pasture lands, and appointed a ranger to keep the keys of the gates, cleanse the ditches, preserve the fences, impound cattle trespassing, &c.; and by a Court of Orders and Decrees, regulations were annually made concerning the right of common to be exercised by the freemen, as to the number of their cattle to be turned on, the time to be turned on, and the price to be paid for each head, which price was always paid by the freemen exercising the right, to the treasurer of the corporation, and which money, after deducting the expense of management, was distributed among the poorer burgesses, who had no cattle to depasture:—Held, that the corporation were liable to be rated to the poor, as occupiers of the land in question, within the meaning of 43 Eliz. c. 2. *Rex v. The Borough of Sudbury*, 4 G. 4. 343

3. The profits arising from the sale of gas, manufactured from coal, and conveyed through pipes and trunks under the pavement, for the purpose of lighting a town, are not rateable to the relief of the poor under the 43 Eliz. c. 2. *Rex v. The Birmingham Gas Light and Coke Company*, 4 G. 4. 385

4. A Canal Company are rateable to the relief of the poor, in each and every parish through which their canal passes, as occupiers of land covered with water. *Rex v. The Trent and Mersey Canal Company*, 4 G. 4. 403

5. Where the owner of a river navigation, running through fourteen different parishes, was rated to the poor of the fourteenth parish (in which the profits arising from the whole navigation were received) in respect of the whole amount of the profits:—Held, that the rate was too high, and ought to have been apportioned among all the parishes through which the navigation passed. *Rex v. Palmer*, 4 G. 4. 416

6. The proprietors of a river navigation are rateable to the relief of the poor in a parish through which the navigation passes (though no riverage dues are received in such parish) in proportion to their profits upon the whole line of navigation. *Rex v. The Earl of Portmore*, 4 G. 4. Page 472

7. By 10 Ann. the city of Norwich, and hamlets and liberties of the same, were incorporated for the purpose of better employing and maintaining the poor thereof, and the guardians thereby appointed were empowered from time to time to ascertain what aggregate sums would be necessary for that purpose, and ascertain what proportion each parish, &c. should contribute, and certify the same to the Justices, two of whom were to issue their warrant, requiring the proper officers of each parish, &c. to rate and assess the amount on the respective inhabitants; and it was provided, that if any person, parish, &c. should find himself or themselves to be unequally assessed, he or they might appeal at the next Sessions held after such assessment made and demanded. Where under this act the governors certified that the hamlet of L. ought to pay a certain proportion of an assessment made upon the whole city, and two Justices issued their warrant, requiring the collectors of the hamlet to assess that sum upon the inhabitants, and the hamlet being aggrieved by such assessment:—Held, that the churchwardens and overseers might appeal against both the certificate and the warrant thereon, as being an assessment made and demanded, within the meaning of the appeal clause. *Rex v. The Mayor and Justices of Norwich*, 4 G. 4. 492

See APPEAL.—PRIVILEGE.

## PRACTICE.

See COUNSEL.

## PRISONER.

A person under examination before Justices of the Peace, on a charge of felony, has no right to have a legal adviser attending on his behalf, still less to cross-examine the witnesses for the prosecution, and to examine opposing testimony to

## RATE.

prove his innocence. The privilege when allowed, is entirely a matter of discretion in the Justices.

Where an attorney of this Court was retained by a prisoner charged with felony, to attend and give him his advice and assistance during his examination before Justices, and after notice to the latter that he attended upon such retainer for that purpose:—Held, that the Justices might forcibly turn him out of the Justice room, and exclude his presence during the investigation of the case. *Quare*, whether this rule applies where the decision of the Justices is final, as on conviction under penal statutes, no appeal being given? *Cox v. Coleridge*, 3 G. 4.

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## PRIVILEGE.

Where a British-born subject, employed as first chorister at the Portuguese Ambassador's chapel, with a salary, rented and occupied a house, and let part of it in lodgings, and a distress was levied on his goods for a poor-rate:—Held, that his goods were not protected by 7 Ann. c. 12, assuming him to be a domestic servant of the Ambassador. *Novello v. Toogood*, 4 G. 4. 441

## PROSECUTOR.

See EXPENSES.

## PURCHASE.

See SETTLEMENT, 15.

## RATE.

By the Manchester and Salford Paving and Lighting Act, 32 Geo. 3. the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses, and other buildings, gardens, garden-ground, and other tenements within the same towns, are liable to be rated for the purposes of the act. Under this act the Manchester and Salford Water Works Company are not rateable as occupiers of a tenement, in respect of their water pipes carried under ground, for supplying those towns with water. *Rex v. The Manchester and Salford Water Works Company*, 4 G. 4. 479

See COUNTY RATE.

## SESSIONS.

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## REMOVEABILITY.

See SETTLEMENT, 3.

## REPLY.

See COUNSEL.

## REVENUE.

See HABEAS CORPUS.

## ROUGE ET NOIR.

See GAMING HOUSE.

## SERVICE.

See SETTLEMENT, 4. 10. 13.

## SESSIONS.

1. Justices may supersede their own order, when improvidently made. On the 20th August, two Justices removed a pauper from the parish of A., to the parish of B.—On the 5th September the churchwardens of B. gave notice of appeal to the Sessions, to be holden on the 17th of October; on the 10th of October, the Justices made an order, superseding their former order of removal, upon doubts of its validity, which supersedeas was served on the parish officers of B., who treated it as a nullity, and went to the Sessions, where the Justices refused to hear the appeal; and now this Court refused to grant a mandamus to the Sessions, to enter, hear, and determine it. *Rex v. The Justices of Norfolk*, 3 G. 4. Page 17
2. Quashing a conviction on a penal statute, for mere matter of form at Sessions, is not an acquittal of the defendant, concluding the case against any further inquiry in this Court. *Rex v. Ridgway*, 3 G. 4. 38
3. Where the Quarter Sessions, on appeal, quashed a conviction of the defendant, on the stat. 39 & 40 G. 3. c. 102, for want of form, subject to the opinion of K. B., upon the point of form. Held, that the order quashing the conviction might be quashed, and the appeal sent down to be tried on the merits, even though there was nothing on the face of the proceedings shewing that the conviction was quashed for form, and that the Sessions desired the opinion of the Court upon the point. *Id.*
4. The statute 39 & 40 G. 3. c. 106. s. 4, enacts, that all persons who shall attend any meeting, had or

rateable to the relief of the poor. Qn. Whether under any circumstances fire and larches can be considered underwood? *Rex v. The Inhabitants of Ferrybridge*, 4 G. 4.

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2. Where a corporation, consisting of a mayor, aldermen, and twenty-four capital burgesses, was seized in fee of certain pasture lands, and appointed a ranger to keep the keys of the gates, cleanse the ditches, preserve the fences, impound cattle trespassing, &c.; and by a Court of Orders and Decrees, regulations were annually made concerning the right of common to be exercised by the freemen, as to the number of their cattle to be turned on, the time to be turned on, and the price to be paid for each head, which price was always paid by the freemen exercising the right, to the treasurer of the corporation, and which money, after deducting the expense of management, was distributed among the poorer burgesses, who had no cattle to depasture:—Held, that the corporation were liable to be rated to the poor, as occupiers of the land in question, within the meaning of 43 Eliz. c. 2. *Rex v. The Borough of Sudbury*, 4 G. 4. 343

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See APPEAL.—PRIVILEGE.

## PRACTICE.

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held "for the purpose" of making or entering into any contract, &c., *by this act declared to be illegal*, or of entering into, &c., any combination for *any purpose*, declared by this act to be illegal, &c.:—Held, that a conviction for attending a meeting "for the purpose" of carrying on a combination "for the purpose" of obtaining an advance of wages, correctly described the offence by the words "for the purpose," though the description of offence referred to in the 4th section was described in the 3d section to be "any combination *to obtain*," the words "for the purpose," and, "to obtain," being synonymous. *Rex v. Ridgway*, 3 G. 4. Page 38

5. The statute 12 Geo. 2. c. 28. s. 5, against deceitful gaming, requires *reasonable notice* of appeal to the Sessions against a conviction, but the notice may be by parol, or in *writing*; its reasonableness, in point of time, is for the Justices at Sessions to determine. *Rex v. The Justices of Surrey*, 3 G. 4. 46

See CERTIORARI, 1. 3.—CHURCHWARDENS AND OVERSEERS.—COUNTY RATE, 2.—MANDAMUS, 1. 2.—POOR RATE, 7.—SETTLEMENT, 1.

### SETTLEMENT.

1. On a question of emancipation, the Court laid down this general rule, in order to exclude discussions in particular cases in future, "that no emancipation is effected, during minority, excepting by marriage, becoming the head of another family, or contracting a relation, such as *wholly and permanently* to exclude the father's control." *Rex v. Wilmington*, 3 G. 4. 64
2. Pauper took a tenement on 21st May, under a written agreement, and did not actually take possession until 4th June, but paid rent from the date of the agreement:—Held, that he did not come to settle until the 4th June, and consequently that the settlement was concluded by 59 Geo. 3. c. 50, which passed on 2d July, although he afterwards resided more than forty days. *Rex v. Brighthelmstone*, 3 G. 4. 74
3. The daughter of Irish parents, pregnant of a child likely to be born a bastard, and therefore actually

- chargeable by 35 Geo. 3. c. 101. s. 6, may be removed to her birth settlement in *England*, though unemancipated, and the head of the family does not, through her, become chargeable by force of 59 G. 3. c. 12. s. 33, so as to render the whole family removeable to *Ireland*. *Rex v. Whitehaven*, 3 G. 4. Page 97
4. A parish apprentice assigned (before the passing of 56 Geo. 3. c. 139) by an old to a new master, by consent in writing, but without the consent of two Justices, as required by 32 Geo. 3. c. 57, gains a settlement by service with the second master, under the contract with the original master. *Rex v. Barlestone*, 3 G. 4. 103
  5. An extra-parochial district having been erected by a local Act of Parliament, into a new township, and it was declared that it should from thenceforth provide for its own poor, and be subject to the same regulations as were incident to other townships in the same county:—Held, that a pauper bastard, born within the district, before it was erected into a township, was not removeable to the new township, as the place of his birth settlement. *Rex v. Oakmere*, 3 G. 4. 109
  6. Where a person rented and resided on a tenement of 9l. 10s. a-year, and during the same time contracted by the year for two ponds, or for the rushes and flags growing therein (he being by business a chair bot-tomer), the owner of the pond reserving to himself the use of the water as he thought proper, the rent agreed for being 5s. a-year for one pond, and 5s. and two door mats, of the value of 2s., for the other:—Held, that he thereby acquired a settlement. *Rex v. The Inhabitants of All Saints in Cambridge*, 3 G. 4. 133
  7. An intestate dies seised of a leasehold cottage, leaving his wife and three daughters him surviving. The wife obtains letters of administration, but makes no distribution of her husband's effects. The husband of one of the daughters is, with permission of the administratrix, let into possession of the cottage, and he and his wife reside therein for some years, until they become chargeable to the parish, without



paying any rent, which during that time was paid by the administratrix:—Held, that the pauper had not such an estate in the premises that a Court of Equity would have decreed a conveyance, and clothed him with the legal title, so as to confer a settlement by an irremovable residence of forty days. *Rex v. The Inhabitants of Berkswell*, 4 G. 4. Page 267

8. Where a minor enlisted into the Royal Marines, and having been discharged from the service at the end of the war, before he attained twenty-one, returned to his father's family:—Held, that he was not emancipated. *Rex v. The Inhabitants of Rotherfield Greys*, 4 G. 4. 294

9. Renting a house, and letting part of it off to a lodger, is holding a separate and distinct dwelling-house within the statute 59 Geo. 3. c. 50, so as to confer a settlement. A *tenement*, within the meaning of that statute, may consist of house and land taken at different times, and of different persons, provided the whole annual rent amounts to 10*l.*, and the land and house be in the same parish. *Rex v. The Inhabitants of North Collingham*, 4 G. 4. 393

10. At the end of a year's service in the parish of N., a master being about to remove into the parish of B., said to his servant, "would you like to go with me thither?" Servant said, "he had no objection." Master replied, "I fear you are scarcely strong enough for the work there, but try." The servant went into B., and, after serving his master for six weeks, the latter asked him what wages he expected; to which he answered, "what you please." The master then said he would give him the same as the year before; with which he was satisfied, and remained in the service until *Michaelmas*, minus ten days; for which period the master deducted a proportionate amount of wages:—Held, that this was a conditional hiring, and conferred a settlement on the servant. *Rex v. The Inhabitants of Northwold*, 4 G. 4. 413

11. A pauper was hired as a labourer in husbandry to serve a farmer, under an agreement that he was to

have yearly wages, and his master either to find him two cows, or provide himself with two, and to feed them on his master's farm. The pauper bought one cow, and his master found him another, both of which were fed during the summer in his master's pasture, and, in the winter, were kept in his master's straw yard, and fed with hay grown upon the farm. The pasture and the hay feeding were respectively worth 5*l.* 5*s.* a-year:—Held, that the pauper did not gain a settlement by renting a tenement of 10*l.* value. *Aliter*, if the contract had been that the cows were to be pasture fed. *Rex v. The Inhabitants of Sutton Saint Edmunds*, 4 G. 4. Page 424

12. A testator charged his manor and lands with an annuity of 20*l.*, to be paid by trustees to a parish schoolmaster, to be nominated by the person or persons who, for the time being, should be entitled to the possession of the manor. In pursuance of the will, a school-master was appointed, and received the annuity for seven years, during which time he had possession of a house (rent free, but worth 10*l.* a year), which was assigned to him as his residence in the character of schoolmaster:—Held, that such residence gained him a settlement within 13 & 14 Car. 2, though by the terms of the will, he was liable at any time to be dismissed from the office of schoolmaster, at the will and pleasure of the donor. *Rex v. The Inhabitants of Lakenheath*, 4 G. 4. 433

13. A parish apprentice bound for nine years, having served for six, asked his mistress leave to go into another service, to which she consented, saying she was not against it, if he could better himself. He then hired himself as a yearly servant to a master in another parish, and informed his mistress of the fact, to which she said, "Very well, I am not against it." In a few days he went to his new place, and in about a fortnight returned to his mistress for his clothes, who said she hoped he liked his new place, and he said he did:—Held, that this was not such a consent on the part of the mistress as would give the pauper a settlement under the indenture in the parish where the new

master resided. *Rex v. The Inhabitants of Whitchurch*, 4 G. 4.

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14. A panper was hired as ground-keeper and his master agreed to give him 20*l.* a-year wages, a cottage to live in, and the joist and whole profits of one cow, for his own services, and the sum of 28*l.*; and the joist and whole profits of another cow, in consideration of his lodging and maintaining in the cottage two of his master's labourers. The contract being entire, and the annual value of the lands on which the two cows were depastured being more than 10*l.*:—Held, that he gained a settlement by renting a tenement within the meaning of the statute. *Rex v. The Inhabitants of Cherry Willingham*, 4 G. 4. 472

15. The lord of a manor gave G. a license in writing to build a house on the waste, which he built accordingly, and sold it to B., who again sold it to T. for 30*l.* T. occupied the house for five years, and paid annually one shilling to the lord, and then re-sold it for 34*l.*:—Held, that T. did not purchase such an estate or interest, either legal or equitable, as to gain a settlement by virtue of 9 Geo. 1. c. 7. s. 5. *Rex v. The Inhabitants of Hagworthingham*, 4 G. 4. 476

#### SHERIFF.

The Court will not give a sheriff directions how he shall dispose of property remaining in his hands, which has been seized in execution towards the payment of a fine upon a defendant convicted of a blasphemous libel; but if the sheriff has made an improper return, it may be quashed. *Rex v. Carlile*, 4 G. 4. 129

See JURY.

#### SMUGGLERS.

The statute 57 Geo. 3. c. 87. s. 5. enacts, that when any person offending against the same, or any other Act relating to the customs or excise, shall be arrested, he is to be conveyed before one or more Justices of the Peace, "residing near to the port or place into which the smuggling vessel is carried, or near to

the place where any such person shall be so taken or arrested." Where two persons were apprehended in a smuggling boat, under this Act, whilst afloat in the port of F., which had an exclusive local jurisdiction, and after being taken on shore and detained two days there, were carried on board again and conveyed into another port, where they were convicted by Justices of another jurisdiction. *Semble*, that such conviction was illegal.

If by the same statute Justices of one local jurisdiction have authority to convict for an offence committed within another, such authority must appear upon the face of the conviction. Therefore, where Justices of the port of D. convicted for an offence committed in the port of F., which had an exclusive jurisdiction, without shewing on the face of the conviction that they had authority to do so, the conviction was quashed. *Ex parte Kite*, 3 G. 4. Page 222

See HABEAS CORPUS.

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| — c. 137. s. 6.   | Poor.                | 213      |
| 56. c. 139.       | Settlement.          | 103      |
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| 1. c. 54.             | Trespass.         | Page 502 |
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## SUPERSEDEAS.

See SESSIONS, 1.

## TENEMENT.

See SETTLEMENT, 2. 6. 9. 11. 12. 14.

## TITHES.

By 7 & 8 W. 3. c. 6, a summary remedy is given before two Justices for the recovery of small tithes, under the value of 40s. [increased to 10l. by 53 Geo. 3. c. 127. s. 3.]; by s. 7, which gives an appeal to the Sessions, the *certiorari* is taken away, "unless the title of the tithes should be in question;" and by s. 8, if any person complained against for subtracting tithes, should insist before two Justices, upon any prescription, composition, or *modus decimandi*, agreement or title, in order to free himself from the tithes claimed, and deliver the same in writing to the Justices, subscribed by him, and should give the party complaining security, to the satisfaction of the Justices, to pay all costs and damages, as upon a trial at law, to be had for that purpose in any superior court, should be given against him; in case the prescription, &c. should not upon such trial be allowed, in such case the Justices should forbear to give any judgment of the matter, and the party complaining should be at liberty to prosecute him for the subtraction in any Court in which he might have sued before the act. *Quære*, whether by this act the Justices have jurisdiction to try a *modus decimandi*? At all events, where, after summons and appearance, two Justices made an order under this statute upon a defendant to pay the value of certain small tithes, and upon the trial of an appeal against the order, the defendant then, for the first time, offered evidence of a *modus decimandi*, which was rejected:—Held, that the Sessions did right, and that if the defendant meant to avail himself of a *modus*

**TRESPASS.**

as ground of defence, he was bound to submit his evidence to the two Justices in the first instance. *Rex v. Jeffery*, 4 G. 4. Page 455

See **HIGHWAY**, 3.

**TOLL.**

To support a claim of toll traverse, a special consideration need not be shewn. Where to trespass for distraining goods brought to the market of *F.* for tolls due in respect thereof, the defendant justified the distress by shewing a prescriptive right as lord of the manor of *F.* of which the town of *F.* formed a part, to take a certain reasonable toll for goods brought within the town for the purpose of being there delivered, and in fact delivered, and averred certain special considerations for taking the toll, to which the plaintiff was no party:—Held, after verdict, that the prescriptive right of soil in the manor, (the toll being coeval therewith) was a sufficient general consideration for the toll, as a toll traverse, the plaintiff having brought and delivered goods within the manor. *Rickards v. Bennett*, 4 G. 4. 362

See **MANDAMUS**, 2.

**TRESPASS.**

Where the plaintiffs, who were employed as contractors, to complete a navigable canal, had erected a dam composed of piles of earth, with the consent of the owner of the soil:—Held, that they might maintain trespass against the defendant for breaking and destroying the same, and that case would not lie. *Dyson and another v. Collick and others*, 3 G. 4. 7

See **JUSTICE OF PEACE**, 2.—**MANDAMUS**, 2.—**PRISONER**.—**TOLL**.

**WORKMEN.****TROVER.**

See **PAWNBROKER**.

**TURNPIKE.**

See **MANDAMUS**, 2.

**UNDERWOOD.**

See **POOR RATE**, 1.

**WAGES.**

See **CERTIORARI**, 2.—**SESSIONS**, 4.

**WARRANT.**

See **HABEAS CORPUS**.—**JUSTICE OF PEACE**, 2.—**POOR RATE**, 7.

**WATER.**

See **RATE**.

**WITNESS.**

1. Whether a conviction for a conspiracy to commit a fraud, disqualifies the convict from giving evidence in a Court of Justice? Such a witness received, per *Abbott*, C. J. at *Nisi Prius*, doubtfully. *Crowther v. Hopwood and others*, 3 G. 4. Page 344

2. A witness attending to give evidence in a Court of Justice, who absconded from his bail, may be retaken by the bail in Court, and he is not protected by his subpoena. *Horn v. Swinford*, 3 G. 4. 351

See **COUNSEL**.—**EXPENSES**.

**WORKHOUSE.**

See **POOR**, 2.

**WORKMEN.**

See **CERTIORARI**, 2.—**SESSIONS**, 4.

END OF THE FIRST VOLUME.











